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Features of the Hungarian legal system after 2010

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I. Goals of the paper

This paper wishes to present the shifts of the inner emphasis of the Hungarian legal system since 2010. Within the framework of this the paper it briefly wishes to deal with – among others – the transformation of the legal system from the natural law's approach, thus with the new tendencies of the legal approach that focuses on underlying values and interests (for example the particular tools of the expansion of the governmental capacity) instead of specific expectations that can be transformed directly into actions that are formed in the rules. Besides the new phenomena that appear as possible advantages – not separable from them – certain regularities and possible consequences of the "over accelerated" national law development that overload all norm systems of the society will be presented – through Hungarian examples.

Nevertheless this paper does not wish to present a complete overview of the Hungarian legal system; it primarily wishes to present the objective social-political processes, legal institutions, legal practice and changes that took place in legal thinking that are considered the most severe *nowadays* and can be listed as the possible defining elements of the near future.

I will not review the near past and the present of the Hungarian legal system from the approach of the constraint of globalisation trends, EU expectations and objective outside effects, I'd rather focus on the inner features significantly defined by the attitude, role consciousness, self-image and goals of the legislator and law enforcer that stand before us as legal and public politics that can be well captured and described through legal instruments as well.

The questions that are related to the lawmaking of the past more than two years are partly of content, inquisitive about the specific solutions of certain regulations; and partly examine the aspect of lawmaking meaning that they refer to the correspondence of the establishment of law to aspects defined in and beyond law.

Legal texts are in every case imprints of the social media in which they were created and one of their goals is to influence the world in

which they were made. So consequently these groups of texts serve as important sources of information not only in the circle of social history reconstruction that aim at the judgement of the past, but they could have a significant role in research about the present's governmental structure and moreover about governmental and legal capacity. Not only itemised provisions should be considered as "legal texts", but also the circumstances they were created in and the documents that set social afterlife of the created rules.

It is evident that legal texts are never simple mapping of reality.[1] If someone tried to reconstruct the social relations of today's Hungary from the Fundamental Law and other legislations in force the picture would be quite false. Therefore if we examine the state of the legal system and of the wider legal system, three equally important fields are presented that should be processed at the same time:

a) the process of the creation of the legal instruments (the correspondence of this process to preliminary expectations, defined regulations, its social surroundings and embeddings),
b) the content of individual and normative decisions, the characteristic features of the single institutions, and
c) the actual application, operation and "rate of utilisation" of the abovementioned.

One of the difficulties of the examination is that the possibilities hidden in the legal system can only be defined by applying excessively complex approaches and methods at the same time (see subchapter II.2). I wish to emphasise that my work undertakes the categorisation of only some of the aspects – that I found important in the circle of the evaluation of today's governmental and narrowly taken legal capacities – and the presentation of certain facts (examples) that can be related to these given aspects, the actual evaluation – including comparative examinations – is only performed at the most necessary degree.

The weak point of every similar analysis (that undertakes the mapping of current processes) is the question of political, more precisely direct

1 Kessler, Rainer: *Az ókori Izráel társadalma. Történeti bevezetés*. [Society of ancient Israel. Historical introduction.] Kálvin Kiadó, Budapest, 2011. p. 42.

party political overtones and crosstalk. Facing this problem rationally is also unavoidable because the dilemma that whether the government, the power structure that does not necessarily respect the rules of legislation created by itself is capable of renewing the moral foundation of the society in a radical – or revolutionary – way comes up again and again in connection with the Hungarian political and legal system in the political argumentation between 2010-2012.

There are two distinct possible answers to the recent suggestion, based on the partly political, partly scientific (?) debates of the past years:

a) *The first can be communicated through a classic statement: saying that a bad/ sick tree cannot have good/ healthy fruit,* and no exemption can be given for systematically neglecting the existing legal regulations; at the same time the representatives of the standpoint believe that a political philosophy built around breaking the rules cannot result in the formation of social cooperation manifested in real compromise and the persistent moral renovation of the society in a positive direction.

b) *Compared to this aspect* those that consider the legislation of the past two years appropriate or at least necessary argue that total and postponed transformation of the big care systems is the absolute merit of the legislation after 2010 and also – in tight connection with the former – it started the legal elimination of the many false social consensus that morally made difficult the social, economic and cultural construction and the survival of the lively tissue of the society. Those that argue this way generally try to illustrate lawmaking as a primarily instrumental, basically quantitative question, saying that lawmaking forced and really accelerated by external circumstances (like the financial crisis) and internal capabilities (like state debt, the heavy inheritance of the past, the moral sinking of the society, etc.) necessarily comes with "some" mistakes as well. And it is also important – the representatives of this aspect say – that the feature and number of these mistakes cannot serve as a reason for someone to doubt the whole legal system or the higher moral status of the political course, assuming that newly created content of these regulation systems coming from real social needs can be justified morally.

I. Goals of the paper

I do not wish to take sides in this rather important and unavoidable question within the frames of this paper: instead of open and simplifying resolution, I perform the process of my topic in a way that besides concept definitions and the presentation of applied methods (Chapter II), on the one hand I briefly list the traditional features and problems of Hungarian public politics (Chapter III); on the other hand I describe the aspects and institutions and draw up the tendencies of change based on which the value of the transformation processes of the past two years can be measured better.

When I mention the elements of the legal system in my work, the circle of these include – broadly, beyond various legal institutions – certain elements of the so-called legal system, like questions related to the lawyers' layer (Chapter VII).

II. Preliminary facts, definition of concepts and methods

1. Introduction

A political and legal transformation took place in Hungary in 1989-90, that basically can be described as a democratic change of the system. However the fast transition from state socialism to capitalism left many social questions unsolved, – that have been present and documented in the 1980s – and generated new difficulties in the level of the social system. So the slightly controlled and forced pace privatisation that covered every sector, the radical change of consumer habits, the stormy acceleration of social differences and tensions (e.g.: the visible break off of Roma people) and the existence of untouched big and wasteful care systems led to the institution of ill-considered borrowing that was not appropriated to production becoming (one of) the main tools of individual and common "prosperity". Briefly this can be summarised that the "price", some sort of political and financial cost of bloodless, peaceful transition was the total absence of breaking up with the past (its institutions, prominent people, way of thinking, "organised reaction attitude", ongoing practices). The particular symptom of this system change – that was partial from a legal aspect, too – was the survival of the Constitution[2] in 1989 – approved in 1949 at the beginning of Communism – totally changed in content but with unchanged structure and number.[3]

2 Constitution is the Constitution of the Hungarian Republic (Act XX of 1949) modified with Act XXXI of 1989 that was in force until 31 December 2011, while from now on the expression Fundamental Law refers to the Fundamental Law of Hungary that entered into force on 1 January 2012

3 The constitution declared on 23 October 1989 in honour of the revolution of 1956 (as it was stated in the preamble) was destined to be temporary. The acceptance of the new constitution was considered to be the task of the Parliament that was formulated as a result of the free elections. However, the constitution that was considered temporary remained lasting, the new constitution was not

In order to understand this study and the phenomenon presented in the coming chapters, it is important to know, why it was/could have been the most important political goal for the conservative (FIDESZ – KDNP) government that rose to power in 2010 to finish the system change through a "revolution" "taking place in the polling booths" that provides appropriate authority though its sweeping and massive nature for the transformation of the whole legal system as well. As it is known, FIDESZ-KDNP won at the national election of spring 2010 with a sweeping rate bigger than 2/3 that was followed by the deep transformation of the whole legal system in a short period of time.

It is impossible to overemphasise the importance of this circumstance: the 2/3 majority – as I referred to it before – is a lucky opportunity for the implementation of long postponed (more than 30 years in Hungary) structural reforms that affect the big care systems, but at the same time it can be a base for legal voluntarism and exercise of power that adapt to formal consultation processes only.

2. Possible ways of capturing the problem. Question of the method

My presumption, that the authentic examination appropriate for further analysis needs a method that applies some sort of inter- or multidisciplinarity; meaning that in the examined topic it is worth creating such strong academic and material frame from other social studies like political science, public administration, Christian social ethics and economic ethics (!) in which and compared to which the legal science arguments in the narrow sense and text level examinations can earn their real place and value.

A priori in order to create a dialogue between law and other forms of knowledge a strongly interdisciplinary starting point is necessary.[4] Today

created; "continuous constitution making" became characteristic instead. The Parliament modified the constitution 25 times in the 20 years passed between 1990 and 2010. Among the modifications we may find small-scale and minor ones and others that may be considered partial revision.

4 Sherwin, Richard: *Intersections of Law and Culture.* [A cross-disciplinary

this means more than using the methods of sociology or discussion analysis to our help for the better understanding and overview of legal processes. Much rather the need for opening towards other new (science) fields that had none or only some connection with legal studies (cultural anthropology,[5] theology,[6] religion studies,[7] social psychology, etc.). Moreover, today the relation of these cannot even be restricted to "mutual introduction" on the level of generalities, rather the creation of such previously constructed interdisciplinary procedures and connecting coherent and systematic methods is necessary, that are able to provide the stable frames of substantive comparative analyses/researches and at the same time they are committed to necessary flexibility and openness as well.[8]

Gyula Gulyás – approaching the question from his own professional field – writes the followings: "Multidisciplinarity requires breaking up with the method of one sided political analysis of institutions and structures: the examinations in this direction have to be complemented with the theoretic and methodical possibilities provided by sociology, economic science and legal science. We have to consider the requirement

conference hosted by the Department of Comparative Literary and Cultural Studies, Franklin College Switzerland, Lugano, October 2, 2009.]

5 See details e.g. Freeman, Michael - Napier, David (editor.): Law and Anthropology. *Current Legal Issues* Volume 12, London, 2009. p 47.

6 According to the most popular approach, theology is not more than a back and forth movement between two endpoints where the two endpoints are the eternal truth and the momentary situation in which the eternal truth has to be discovered. E.g. Tillich, Paul: Systematic Theology. Reason and Revelation, *Being and God*, 1/1951. p. 3.

7 If a religious study is a synthetic and according to the nature a describing study, the main goal of which is to take into account the religious phenomena; then besides the sectoral professional sciences traditionally classified in this circle, the involvement of characteristic methods and presumptions of legal theory and branches of legal science that rely on positive law in the analysis possibilities of certain dimensions of religious reality may seem possible and necessary, especially if it has an effect on law itself.

8 Rothchild, Jonathan: Law, Religion, and Culture: The Function of System in Niklas Luhmann and Kathryn Tanner. *Journal of Law and Religion* (2008-2009), Vol. XXIV., p. 476.

of 'relevance' on problem orientation and problem solving, meaning that the science of public politics has to aim at the possible solutions of the real world, the making of public politics and it has to turn its back on such sterile academic debates like the interpretation of the classics of theoretic politics or the criteria system of good politics. According to Lasswell, the 'strong criteria' of normativity particularly requires that the science of public politics has to break up with the false pretence of 'academic objectivity' and it openly has to admit that in the analysis of governmental actions, it is impossible for a researcher to separate the goals and the tools, and the values and techniques."[9]

Nowadays it can be observed that the examination of the legal system is often simplified solely into a constitution based evaluation of a constitutional aspect.[10] Even if we chose this – otherwise understandable – starting point[11], it can be stated that "The examination of [The] constitution as a norm category, needs the validation of a complex system of aspects considering its creation, modification (change), its subject, effect and its individual features".[12] One of the reasons for this is that "Constitution making is an act with legal and political features at the same time. The decision whether a new constitution is needed is made outside the system of law. The question of the main directions of a new constitution (e.g. Form of government, mechanism of protecting

9 Gulyás, Gyula: *A közpolitika paradoxonai. [Paradoxes of public policy.]* PhD disszertáció. (Doctoral dissertation.) Budapest, 2002. /kézirat/ p. 69.

10 And – approaching the question in another way – we may experience that the examination of certain fields of social phenomenon (that are examined in this paper), seems to be "kept" for the sciences of constitutional law and legal sociology.

11 "The constitution is the origin of a legal system, it is the benchmark that helps the judgement of every other laws. That is why it is very hard for a constitutional lawyer to judge a new constitution and the process of constitution making – as that benchmark is the subject of examination that can be used as a measure in other cases." Csink, Lóránt – Fröhlich, Johanna: *Egy alkotmány margójára. Alkotmányelméleti és értelmezési kérdések az Alaptörvényről.* [On the margins of a constitution. Constitutional theory and interpretation questions about the Fundamental Law.] Gondolat Kiadó, Budapest, 2012. p. 13. [hereinafter referred to as Csink – Fröhlich (2012a)]

12 Csink – Fröhlich (2012a) p. 16.

basic rights, etc.) also does not belong to the territory of law. These decisions have to be made by politics".[13] One certain constitution always contains at least two types of group of norm as well: one group of positive legal norms and another of political norms. A constitutional law (as professional law) analysis is absolutely necessary, but it can never be satisfactory if it does not cover the introduction of the nature of political norms.[14] *Broadly*: the material problem of constitution making cannot be dealt with solely from the aspect of law or legal science either; only the sum of views and aspects of many professional studies can create the catalogue of questions and the pile of answers that allow the substantial performance of the task.[15]

2.1. Beyond multi and interdisciplinarity: the new aspect of social studies

Modernity came with the introduction of new explanatory principles in political philosophy as well. The majority of authors discussing good government and the order of social coexistence also explained "the human phenomenon" based on the ontological and epistemological presumptions of the Cartesian-Newtonian world view, that was dominant in the new age social sciences for a long time and all other approaches were declared irrational: the individual was considered to be the implicit starting point and atomic unit of social examinations.[16] One way or another the raison d'etre of political institutions was deduced from authority given by and/or the natural endeavours attributed to the individuals. The historical heritage and the „blind" forces of nature were taken into account as the obstacles to overcome of the smooth evolution of the individual.

13 Csink – Fröhlich (2012a) p. 13.

14 Szigeti, Péter: *Társadalomkutatás – mi végre? Politikatudomány – Alkotmányjog – Világrendszerelmélet.* [Social research – for what? Political science – Constitutional Law – World system theory.] Publicationes Jaurinenses op. 9. Széchenyi István Egyetem, Győr, 2011. p. 53. [hereinafter referred to as Szigeti (2011)]

15 Ibid.

16 Lányi, András: Az ökológia mint politikai filozófia. [Ecology as political philosophy.] *Politikatudományi Szemle* 1/2012. p. 105.

The main political goal became emancipation, the liberation of the individual from these bounds, the main tool of which is purely rational power.[17]

Today's canon demands the society's researchers to clearly distinguish statements that contain facts or value judgements. The „academic majority" is tends to admit only the former to be rationally manageable, meaning to be real.[18] The global expansion of rational institutions matured further huge changes by the end of the 20th century, for as much as in the [complex] operation of „power of knowledge" embodied in networks, techniques and formalised relations (e.g. law, market, information technology) became more and more uncontrollable and distressing.[19]

It can be stated that social sciences are increasingly forced to start to also examine the underlying meaning of things and the broader logical framework of examined phenomenon more deeply besides or instead of descriptive questions that are inquisitive about operation. In era of crisis, when everyday experience confutes our previous expectations, legal and political theory is radicalised as well: it has to examine and rethink the validity of its presumptions that were considered stable. "This way philosophising will gain civil rights again, as it is harder and harder to exclude such questions from political theory discussion that has needs of describing professional science and is averse to philosophical questioning that are not related to the method of the operation, but to its sense (meaning the frames of interpretation). [20]

The attention of legal science, besides others, also turns more and more to the question of morale principles penetrating – more – into the world of law. One certain sign of this is that the forefronts of "traditional" legal positivism create their own criteria systems one after another, which may allow this incorporation to happen justifiably.[21]

17 Ibid.

18 Lányi op. sic. p. 106.

19 Lányi op. sic. p. 107.

20 Ibid.

21 Matthew H. Kramer: *Where Law and Morality Meet*. Cambridge University Press, 2008. 17.

3. The concept of governmental capacity and its connection with the legal system

It is obvious based on the abovementioned as well, that when I examine the newest Hungarian legal system, the discovery of facts and processes would be possible in many approaches, based on many theoretical and practical viewpoints; however this work consciously wishes to emphatically enforce the aspect the so-called governmental capacity (both in the circle of choosing the aspects of the examination and grouping the facts), and by way of introduction we have to clear the reason(s) for choice and the meaning of this concept. The reason for choice was indeed that condition analysed above that during the examination such system of aspects and methodology is reasonable that is versatile enough; so it is obvious that for example a comparison with the fashionable expectations of lawmaking today alone cannot give answers to the questions inquisitive about the state of the Hungarian legal system after 2010. Such approach is justified which broadens the circle of applicable methods (which may be and to be applied) as well standing in the "segment" of legal theory in the widest sense, political science, sociology and other fields. And the – appropriately flexible and fashionable – concept of capacity seems to be an appropriate, suitable starting point.

The state-organised society's legal system is most directly connected to the question of (governmental) capacity by the concept of legitimacy, if that refers to the social foundation, acceptance of a regime.[22]

The old-new tool of the state with an active and strong self-image that wishes to create new balance between the endeavours of the market and the needs of the society is guiding the society through law, that however goes through significant changes of form not only because of the applied individual solutions, but because of the movement of the inner balance of the legal system and especially because of the emphasis of its bound to the moral sphere.

22 Of course among the appearing factors as the reasons for dominant acceptance historical traditions, supernatural charisma and other things may appear besides the fact of regulation by law.

Capacity building can be defined as the sum of conscious activities aimed at the strengthening of governmental capacity. The subject of building capacity can be the government of the affected country, but it often can be other international entities (e.g. bi- and multilateral donor organisations) as well. The latter scenario was and is the case for a long time in the transitioning countries, even though with decreasing importance in time; meaning that capacity building is closely related to the concept of providing technical and financial aid. Capacity building is most frequently or at least traditionally aimed at the organisations of the government itself – including both political (e.g. political decision making bodies, politicians) and administrative elements. Beyond that, however, they can affect the so-called non-governmental organisations or the in general broader community of citizens as well.[23]

And as for the specific goals of activities/programs aimed at building capacity, these are the developments of human resources, institutions as microstructures and institutions in a wider sense as macrostructures.[24]

Governmental capacity – in a wider sense – shows the ability of the state that allows fighting certain impending, hindering conditions, in order to realise its public political goals.[25] Even though this need that occurs on the state's side is far from being new – practically it is the same age as the state-organised society – the concept itself (as *state capacity*, *government capacity, policy performance and executive capacity, etc.)* is relatively new, the literature of the 80s does not deal with it yet.[26] Part of our uncertainties regarding the concept may originate from that it is very hard to find substantive indicators, that can be used well and stand up to the test of comparisons, especially that they are often very complex „sum of viewpoints" that consist of many elements. The approach from the side of trust capacity is like that for example,[27] that is not afraid of

23 Hajnal, György: *Adalékok a magyarországi közpolitika kudarcaihoz.* [Supplements to the failures of Hungarian public politics] KSzK ROP 3.1.1. Programigazgatóság, Budapest, 2008. p. 42.

24 Ibid.

25 Bevir, Mark: *Key concepts in governance.* SAGE, Delhi, 2009. p. 41.

26 See e.g. Janda, Kenneth – Berry, Jeffrey M.– Goldman, Jerry: *The Challenge of Democracy. Government in America.* Houghton Mifflin Company, Boston, 1989.

27 See e.g. Boda, Zsolt – Medve-Bálint, Gergő: Intézményi bizalom a régi

the complex examination of mutualities based on trust either besides the traditional measures of the trust towards the institutions[28]

When defining the concept of capacity the mention of such concepts that can be found during the description of similar phenomena in social sciences can be useful. The novel expression of *social power* can be like this for example, which is the measure of a certain group's (e.g.: ones in powerful position, or the ones in power) social abilities, in which these abilities form the tools or conditions of the satisfaction of needs of another group (e.g. the whole society, or smaller groups) as an object.[29]

Among the conscious actions aimed at the strengthening of governmental capacity, and as some sort of frame of these activities the lawmaking has an unavoidable role as well. In this context we can also talk about *legal capacity*, as a narrower aspect of governmental capacity. This study – as we already mentioned – does not wish to give a complex overview about the Hungarian legal system; it primarily wishes to introduce those legal institutions, legal practices and changes occurred in legal thinking that seem to be the most emphatic nowadays, and can be listed among the – possible – defining elements of the near social future.

Among the reasons for the creation of this present writing the fact that basic and radical changes occurred in Hungary between 2010 and 2012 that brought significant novelties regarding the content of the previously existing legal institutions, the introduction of new legal institutions in the legal system and the ideas about the law's social role and possibilities is of primary importance. One of the most specified elements of these changes is the integral system consisting of the new constitution and the related great number of cardinal laws – that now allows drawing many conclusions – that generated significant European echoes, regarding both the nature and direction of intentions and certain specific solutions.

és az új demokráciákban. [Institutional trust in old and new democracies] *Politikatudományi Szemle* 2/2012. p. 27.

28 Meleg, Csilla: A bizalom hálójában – társadalmi nézőpontok. [In the web of trust – social aspects] *JURA* 2012/1. pp. 72-75.

29 Farkas, Zoltán: A hatalom és az uralom fogalma. [The concept of power and regime] *Politikatudományi Szemle* 2/2011. p. 31.

My work, of course, – as I have already mentioned before – wishes to refer to context regarding the European Union in the examined topic, but instead of the deep analysis of the effects of EU legal instruments and practice on the Hungarian governmental capacity, *primarily* I will make an attempt to draw up the inside facts and processes (resources, structures and transforming legal aspect) that can be influenced directly.

I will get round to draw up today's outlines of the single capacity elements in a way that I either draw attention to processes going on in the same circle often with an opposite indication, or I will present the possible advantages and dangers created upon the new phenomena through a specific example regarding the examined question.

I repeatedly wish to emphasise that my work does not wish to perform the *direct* evaluation of the government's legislative activity; primarily I am taking on drawing up the necessary facts and novel classification in some aspects.

III. Traditional features of the Hungarian legal system and of the national and social environment

1. Traditional features of Hungarian public and legal politics

One of the starting points of this study is that the new democracies in Central-Europe created after 1989 did not build the political system on layered sophisticated social consultation processes and institution systems based on broad social participation, but almost solely on the structure of Parliament centred politics making that is working on the base of the principle of representation. Rezsőházy considers that one of the biggest problems of societies coming out of dictatorships is that as a consequence of the absence of civil society between the individual and the state, the members of these societies could not learn and built in themselves the identification of problems, the definition of their interests, the exchange of thoughts, the reconciliation of different opinions, which results in that the variety of the management of problems could not evolve.[30] It can be stated from the side of public politics that legal and institutional conditions of representative democracy were created in Hungary after 1990, but no substantive move has been made towards participatory democracy; meaning that Hungarian democracy has frozen on the level of representative democracy.[31]

Based on the most important features of the public politics/public administration environment we have to state in advance regarding Hungary, that a) shifting off responsibility and the absence of democratic control, accountability and transparency are general because of the traditional

30 Interview with Rudolf Rezsőházy *Új Horizont* 1/2001. p. 1.

31 Dr. Jenei, György: Adalékok az állami szerepvállalás közpolitika-elméleti hátteréről. [Supplements about the public politics-theoretical background of the state's participation] In: Hosszú, Hortenzia – Gellén, Márton (editor): *Államszerep válság idején*. [State role during crisis] COMPLEX Kiadó, Budapest, 2010. p. 95.

„top down" system; b) the quality of the decisions of the public sphere is often inappropriate, the implementation is difficult, the evaluation is one-sided because of the politicised and instable practice of reconciliation of interests; c) public politics is imbalanced, it is disproportionate and unpredictable because of the weight and coordination of the affected parties, moreover the relationship of the political-administrative system and society is characterised by political predominance;[32] d) the last phase of public politics is missing; the processes of public politics begin but they often do no "run out", they do not have evaluation and closing phase.[33] In the circle of this evaluation the prior and posterior impact assessment of laws have a crucial role, especially the posterior impact assessment, the primary goal of which is to support the decision making situation of the lawmaker, for as much as the examination expands the pile of facts, the consideration of which is indispensable to make a well-thought, justified decision.[34]

It also has to be mentioned here that in the modernisation of the Hungarian public administration – on the measure of Western reform trends – the deficiencies of the balance of state and market are continuous;[35] and in the Hungarian model of public politics decision making - as it was already mentioned – the "top-down" approach is dominant, for as much as the institutional mechanisms of the involvement of advocacy-integrative organisations operate formally only.[36] It is also inseparable from the latter fact that the traditionally characteristic features of Hungarian political culture are paternalism, intolerance and transforming personal relations into political.[37]

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32 Jenei op. sic. p. 95.

33 Pesti, Sándor: *Közpolitika szöveggyűjtemény. [Public politics anthology]* Rejtjel, Budapest, 2001. p. 206.

34 See details: *A Közigazgatás Korszerűsítésének kormánybiztosa által készített szempontok. „Részletes útmutató a hatályos jogszabályok utólagos és jogszabálytervezetek előzetes felülvizsgálatához." [Aspects prepared by the governmental commissioner of the Modernisation of the Public Administration. "Detailed instructions to the posterior review of regulations in force and preliminary review of regulation drafts."]* Budapest, 1995. p. 5.

35 Jenei op. sic. p. 94.

36 Jenei op. sic. p. 95.

37 Kulcsár, Kálmán: *Politika és jogszociológia.[Politics and legal sociology.]* Akadémiai

One of the possible aspects of the politisation of public administration is participation of civil servants in politics. It rarely happens in Europe that public administration is the social base of political turns, but – in a specific way – it is the professional and democratic commitment of the Hungarian civil service sector that can be brought up as an example, for as much as it had an important role in the speed of the constitutional and institutional processes of the change in the political system. International examples show that in countries where the middle class in weak, the personnel of public administration often has a moderating political function, representing significant power at the elections for example."[38]

Among the classic governmental failure phenomena – that are not only characteristic in Hungary, but can be observed here for certain – we can mention the theoretical difficulties and measurability uncertainties of setting public political goals, the influence practised by strong interest groups and the difficulties regarding the size and complexity of governmental activities and the difficulties related to causal linking between certain public political programs.[39]

It is also important that in Hungary "the all-time present stands out by the strong and unreasonable delegitimizing of the all-time past, instead of putting forward its own performance".[40] In this field of force even the governmental course changes have "disastrous" features. The phenomenon of *value crisis* known in sociology can arise following such legitimacy struggle...[41]

To sum up it can be stated that the predominance of political, subjective factors can be observed in the social development of the past twenty years, in opposition to other – economic, social, legal and EU integration – aspects.[42]

Kiadó, Budapest, 1987. p. 336. [hereinafter referred to as Kulcsár (1987)]

38 Vass, László: A politika és a közigazgatás viszonya. [The relationship of politics and public administration] *Politikatudományi Szemle* 2010/3. p. 71.

39 Hajnal op. sic. p. 33.

40 Szigeti, Péter: *A magyar köztársaság jogrendszerének állapota 1989 – 2006*. [The state of the legal system of the Hungarian Republic 1989-2006] Akadémiai Kiadó, Budapest, 2008. p. 17. [hereinafter referred to as Szigeti (2008)]

41 Ibid.

42 Szigeti (2011) p. 24.

2. Features of the legal system and of the system of social norms in Hungary in the past decades

"We are obviously living in the age of changes in which law is becoming less the fixer of some agreed tradition. From the duality that on the one hand law is the guard of all-time status quo, but on the other hand it is one of the tools – at least in silence – of social dynamism and novelties, the latter seems to overcome the other."[43] In other words: the two important expectations towards law are great (formal) stability on the one hand, and sensitivity able to react, considering social interest on the other.[44]

It was especially important for the Hungarian government after 2010 to base its own lawmaking, including the Constitution on a solid, "irrefutable" – *let's say moral* – foundation because of the extraordinary extent of legal changes. In relation to this handling the examination of certain (professional) administration fields (politics) as solely regulation questions of legal nature would be a mistake. In social fields regulated by law the presence of other type (level) of normativity is also important; from the rules of everyday social coexistence to the questions of more special responsibility relations settled by political etiquette. The well developed law does not eliminate the raison d'etre or individual norms, community norms and organisational norms,[45] as the generality of law can only be realised with the „intervention" of these.[46] Moreover, it was the unsuccessfulness of the previous lobby act (see subchapter VI.3.3.) that showed that in some fields the state cannot enter with its own additional regulations even in the case of the absence of self-regulation:

43 Varga, Csaba: A jog és a jogfilozófia perspektívái a jelen feladatai tükrében. [Perspectives of law and legal philosophy in the light of the present tasks.] *Állam- és jogtudomány* 2008/2. p. 29. [hereinafter referred to as Varga (2008)]

44 Luhmann, Niklas: A jog mint szociális rendszer. [Law as social system] In: Cs. Kiss, Lajos – Karácsony, András (editor..): *A társadalom és a jog autopoietikus felépítése*. [The autopoietichal structure of the society and the law.] Budapest, 1994. p. 65.

45 Especially not the mixture of morality and politics, the convention (see Szigeti, Péter – Takács, Péter: *A jogállamiság jogelmélete*. [Legal theory of the rule of law] Napvilág Kiadó, Budapest 1998. p. 117.).

46 Tamás, András: *A közigazgatási jog elmélete*. [Theory of public administration law] Szent István Társulat, Budapest, 2001. p. 145.

in certain social spheres a lasting result can only be achieved only through the permanent stimulation of self-regulating mechanisms, which is a slow and difficult solution but without any alternatives. That is why the new lobby regulation – partly – chooses the solution that it only creates mandatory regulations on the side of the public servant that welcomes the lobbyist, and otherwise it is satisfied with creating samples through its own evolving practice on the one hand, and relying on the existence of already created criminal law limits (bribery etc.) This results in that when we are examining the nature of law, we have to measure how the abovementioned types of norms differ from law, what interaction they have with law, and up to what extent does the practical use of law depends on the existence and structure of other regulation systems.[47]

The existence of the norm's validity is mostly proved by the sanction coming after the violation of law, but this – the viability of the sanction – needs some sort of collective conscious and solidarity.[48] Today law – in some tendency-like references – gives up on its own general preventive opportunities – just because in the absence of consciousness and solidarity. For example the institution of community service regulated in criminal law hardly exists in our present legal life *in practice*, and the disintegrating social experience that is against all sorts of cohesion that work does not really have any value (and in this approach everyday work is just an obligation justified by the desire to survive) is reflected even in this fact. Likewise if during the execution of a penalty the society gives up on the possibility of (re)education, at the same time it states that the sole substantive goal of the penalty is segregation, meaning there is no valid reason that could link one person to another through future possible cooperation.

According to András Tamás *"law is an implicit imperativus in the world of sacred law at the most, but not in the modern political state.* As the basic principle

47 „The Nature of Law" /article/ Stanford Encyclopedia of Philosophy, January 4, 2007 http://www.google.hu/searchsourceid=navclient&hl=hu&ie=UTF&rlz=1T4PCTC_huHU374HU375&q=An+Outline+of+Contemporary+Legal+Thought

48 Frivaldszky, János: *Klasszikus természetjog és jogfilozófia. [Classic natural law and legal philosophy]* Szent István Társulat, Budapest, 2007. p. 382.

of this is the moral and political foundation of liberty and equality."[49] Even one of the most remarkable sources of danger of our age should be sought in this approach, for as much as this "enlightened" logic transformed into "positive law" that is lacking direct sacred elements makes easier the norm and the underlying moral cause becoming detached and makes possible the "fading" of considerations giving grounds to the norm from behind the norm that continues to be valid. For example one of the most essential problems of the Hungarian public administration is that social reaction attitude that considers sanction, and the possibility of it – separated from its direct, individual responsibility movement that is necessarily evaluating – as *a cost of socially acceptable, but legally prohibited behaviours* (see subchapter. IV.2.3.2.).

It is also obvious that significant part of changes arising in law is a fiction from the aspect of the process of social change: these show law as well as the state to be variable [even] where almost nothing happens".[50] As András Sajó also draws attention to "that in the present society the fear of real change raised the [at least apparent] adaptation to new to be official value and requirement".[51]

The different system logics of law and society also appear as the reason for *the densification of law*[52] for as much as the (sometimes) pathological effects of the densification of law can be traced back to the differences in the system structure, motivations and rationality – and deficiencies appearing on the side of other parallel social norm types.[53] The densification of law means the penetration of law into certain – visibly – autonomous social spheres that through their own system logics partly form law have repercussions on it. The fact that lawmaking processes and individual decisions became part of not just the broadly taken public, *but the most broadly taken popular culture and media considers*

49 Ibid.

50 Sajó, András: *Társadalmi-jogi változás. [Social-legal change.]* Akadémiai Kiadó, Budapest, 1988. p. 7.

51 Ibid.

52 Which is explained by others also with the emerging of "politics in court". See e.g.: Pokol Béla: *A jog elmélete.* [Legal theory.] Rejtjel Kiadó, Budapest, 2000.

53 Teubner op. sic. p. 73.

them as their own as well basically changes the operation method of law.[54] However this latter phenomenon itself does not eliminate the – at least partial - pertinence of ideas about the law's self-reference closeness, for as much as law also creates an autonomous legal reality through its own operations and it rather regulates and directs society this way through its own regulation and building from itself. [55]

Further important supplement is that the trend-like changes of today's legal life – detectable both in Hungary and abroad and strengthened by crises - emphasise the aspects of *operability* instead of emphasising the law[56], the *rebuild* of the *state* instead of its exile[57,] *the suppression of*

54 Sherwin, Richard: *Intersections of Law and Culture.* [A cross-disciplinary conference hosted by the Department of Comparative Literary and Cultural Studies, Franklin College Switzerland, Lugano, October 2, 2009.]

55 Teubner, Gunther: Társadalomirányítás reflexív jog révén. [Social management through reflexive law.] In: Cs. Kiss, Lajos – Karácsony, András (editor): *A társadalom és a jog autopoietikus felépítése.* [Autopoiethical structure of society and law.] Budapest, 1994. p. 67.

56 The Constitutional Court explained in the 41/2005. (X. 27.) AB decision that it has a function originating from the Constitution in the protection of bodies with autonomy. It clearly pinned down that "for example a legal regulation that regulates the organisation of local governments in a way that it limits the essential content of the right to form organisations, leads to the emptying of municipal law, to its actual deprivation, and excludes the government making decisions with own responsibility in questions regarding its own organisation cannot be considered constitutional." Accordingly, for example the autonomous operation of higher education institutions was recognised as a constitutional value by the Constitutional Court. According to constitutional judge László Kiss, who appended a dissenting opinion to the resolution "it is the state's right and responsibility at the same time for the higher education institution system to be "operable". In this – unchanged democratic – approach the operability is more than institutionalised existence in a way that it makes the everyday life of citizens much more "liveable". See in details: Kiss, László: Jogállam és/vagy élhető állam. [Rule of law and/or liveable state.] In: *A demokrácia deficitje.* [Deficit of democracy.] PTE ÁJK – Pécs-Baranyai Értelmiségi Egyesület, Pécs, 2008. p. 142.

57 In connection with the state's role the opinions that from the (New) Public Management state concept and the neoweberian state ideas markedly argue in favour of the latter are getting stronger; for as much as they state that instead of the aspects of cost efficiency, result orientation, etc. and the "reduction" and "unattractioning" of the state coming from that and the bigger and bigger

the processual, negotiated feature of law[58] and they *need the creation of new public consensus on a social level.*[59] All these intentions cry for scientific and political foundations, moreover – precisely because of the emptying of law, it becoming plastic and unstable and because of the vanishing of the general preventive effect – they have an even bigger wish: they make an attempt to bring moral and law "institutionally" closer, grabbing it

outsourcing of the state functions, attempt should be made at the creation of a strong(er) and (more) active state. The newer approaches consider the maintenance of the requirements of the rule of law important, and also the further endorsement of certain efficiency aspects, but they think it is inevitable to substantially involve the elements of strategic thinking and strategic planning in public politics. The believers of a stronger state – who, in the debate about good government and good governance tend to take stronger position in favour of the importance of the former – argue that accountability and responsibility appearing as basic requirements are only possible where a thoroughly rethought strategy of cooperation between the state and the private sphere appears – contrary to for example the uncertainty of outsourcing that blurs sharp boundaries. (Also see subchapter 4.2.1.)

58 A reference to the processual nature of law – in the most common and neutral meaning – refers to the process in which from the creation of circumstances providing reasons for lawmaking to the realisation of some specific method of justice, certain life and legal relations are formed, and expand in the frames offered by law. Compares to this neutral conceptual approach, the negatively taken processual nature refers to the exaggeration of law's "negotiative" feature, and to the deterioration of predictability through that.

59 The non-revolutionary social – and through that necessarily state – model- and path changes mainly happen because of internal, moral based changes lying on some pact or because of external – typically economic – shock(s). The success of path changes in the 21st century basically depends on the success of keeping the social level knowledge under control that could mean the (personal) centralisation of intelligence and the institutionalisation of the successful concentration of the information at disposal. Another key question of the state model changes is the "setting" and practical application of the feature and measure of state interventions and adequate – not only economic – incentives. The objective regarding the diversification of represented interests appears with special importance in the latter circle; all intentions regarding the involvement of previously underrepresented interests that is aimed at the micro level presentation – and not least at the settlement by law – of the possibility of "having a say" for example.

as the sole possible alternative. *We have to add that the crisis (crises) of our age is not primarily of economic nature, but rather of moral and ethical nature.*[60]

Some approaches consider the formation of the so-called service state such "ending point" of possible development, when the state organisation moves far away from the starting point, the pyramid-like royal "government" that is absolute and centralised, acts in a legally free, "opportunist" way, and makes unified and efficient directions and decisions against the citizens.[61] It does this in a way that it "returns to the before absolutism forms of autonomy and segregation", and also when it has *to deal with the long legal procedures of the realisation and control of the state will.* So, the bothering series of conciliations and negotiations with the "orders" appears again – with new players – that led/lead to the formation of new problems of cooperation and coordination in planning and administration. Despite the mentioned development tendencies – that indicate a kind of limited deterioration of the internal sovereignty of the state through the strengthening of the law's negotiated feature – the modern state organisation still has significant elements of structures formulates in absolutism and liberalism.[62]

Representatives of modernist trends in legal science, like Hart, Kelsen, Dworkin or even Finnis try to present law as a unified whole and illustrate rule of law as a method that is able dissolve value and social conflicts in a neutral way, on a non-subjective base. On the contrary postmodern reality does not justify this rigid homogeneity, this one-way and homogenous process based on constraint. Moreover, the wide expansion of delegated lawmaking, self-regulation of players, various ADR techniques[63] obviously burst the "traditional" and closed system of

60 Vízi E., Szilveszter: „Az erkölcs mindennek az alapja." [Moral is the foundation of everything.] In: Hankiss ,Elemér – Heltai, Péter: *Münchhausen báró kerestetik. [Searching for Baron Münchhausen.]* Budapest, Médiavilág, 2009. p. 363.

61 Pernthaler, Peter:Az állam szervezete, [Organisation of the state.] In: Takács, Péter (szerk.): *Államtan – Írások a XXI. századi általános államtudomány köréből. [State study – Writings from the general political science of the 21st century.]* Szent István Társulat, Budapest, 2003. p. 338.

62 Ibid.

63 ADR (Alternative Dispute Resolution) is the overall name of dispute resolution processes that the parties use voluntarily – considering the nature of the conflict

rules and values.[64] Moreover, the ADR techniques push conflicts partly over the territory of traditional law and legal equality.

The abovementioned are grabbed in the thought of Csaba Varga as well: "The change of the interest of theoretic legal thinking occurred in the past decades is related to the significant transformation of our world view, and this explains the rewriting of the decorporealisation of law as a primarily discursive process, a particular communication. It is a telltale sign in the Western-European and Atlantic legal world's description that they expect the continuous release of the exclusivity of the positivity of law originating from itemization, which is described with liberal phrases, such as democratisation, participation, and/or the multi-polarisation of legal procedures."[65]

Following the more conscious reflection on the base units of the construction of sociality (in social studies), the formulation of the "role" category had a crucial importance in exploration of the reasons for the weakening of cohesion and solidarity. Based on Georg Simmel the "role" category allows us not to base the certain comprehensive social formations on the people that participate in them with actions, but to formulate them on the line of the roles that represent only a slice of their personality. The modernising societies create more and more relations – on which such comprehensive social creations were organised – in which the participants become important from one aspect only, and their whole personality remains outside of these creations. The single individual participates more and more in specialised roles – by the disciplined suppression of the other parts of his personality – in the

– before or instead of taking the dispute to court. ADR techniques have always existed, even though they were not called this; Hungarian legal history offers many examples for various negotiation-redemption compositions as well (e.g. the *Decretum maius* of Mathias Rex allowed the agreement of the convicted and the plaintiff-accuser-victim and so the redemption of the imposed punishment.) To that extent the name of the ADR may be new, but its content can be considered „traditional".

64 Balkin, J. M.: „What is Postmodern Constitutionalism?" *Michigan Law Review* (1992) 90 – 1966.

65 Varga (2008) p. 29.

modern societies and the dramatically increased complexity of the society is based on such social organisation performed in disciplined roles.[66]

Segmentation, even "stratification" of existence, appearing regarding individuals created the opportunity for the classic proportions of rights and responsibilities of given individuals to start a dissolution. Weakening of families and the dissolution of many previous social forms contributed to the formulation of the value crisis that has become general by now. *In the various fields of existence – school, official media, and family – the traditional system of rights and responsibilities has been shaken.* Besides the excessive emphasis of individual rights and opportunities the performance of obligations and the responsibility for the community has been pushed back.[67] As it was stated in a recently published volume of studies "the escape from all sorts of obligations" has become general.[68] So, "the aspect of basic rights" might have been strengthened too much in the past decades that considered the aspects of sustainability, applicability and operability as residual items, compared to the expansion of the catalogue of rights and strengthening certain laws in content.

Another important aspect in the examined circle is that the validity of law – at least in an aspect of legal sociology – also depends on the answer given to the question of how likely it can be stated that the law will be applied indeed.[69] Despite the carefully created norm concept if (a significant) part of the regulations are not realised because of legal, financial technical reasons or ones *originating from the public morale* or – and this is (was) also considered general – are not realised in time[70]

66 Pokol, Béla: *A professzionális intézményrendszerek elmélete.* [Theory of professional institution systems.] Felsőoktatási Koordinációs Iroda, Budapest, 1992. p. 218.

67 Csermely – Fodor – Joly – Lámfalussy: *Ajánlás a nevelés-oktatás rendszerének újjáépítésére és a korrupció megfékezésére. [Recommendation for the rebuilt of the education system and the restraint of corruption.]* Bölcsek Tanácsa Alapítvány, Budapest, 2009. p. 11.

68 José Ortega y Gasset: *A tömegek lázadása. [Rebellion of masses.]* Pont Kiadó, Budapest, 1995. p. 187.

69 Tamás op. sic. p. 144.

70 E.g. majority of the civil organisations taking care of people with disabilities did not receive the normative based budget support for 2012 until July 2012. Because of that many organisations were pushed to the edge of functionality.

IV. New elements and tendencies of the Hungarian legal system

In this chapter we will explore the main elements and tendencies - that can substantially influence the governmental capacity – of the renovation of the legal system as the possible aspects of the evaluation of the governmental capacity.

Based on Chapter III. the question can be formulated in a way that up to what extent was the legal system renewed in the past two years able and in the future up to what extent will it be able to correct the traditional, but negative tendencies showing in (both) lawmaking and law enforcement.

So in this part of my work I undertake to briefly list phenomenona I consider important and the connecting main criteria in connection which the Reader can decide how those may influence governmental and legal capacity. These elements and „institutions" are not necessarily homogenous and we cannot even consider the review comprehensive, but my work is an *intentional call as well, to in order for the presentation of missing aspects and for the increased creation of „method clearing" to be performed in a later academic discussion.*

So let's see briefly the certain more important elements of the Hungarian legal system examined from the aspect of governmental capacity!

1. Response to the crisis and natural law movement

1.1. Giving up the concept of continuous growth and development

Until recently, most of the papers – connected to the various fields of social sciences – takes/took the concepts of predictability, continuous expansion, growth and prosperity for granted - even without expressed mention - as the defining elements of the external environment. Since we carelessly assumed – presuming the relative peace of the past 67 years to

be an irrefutable base - that the changes will be considered conjunctural fluctuation at most, like a wave motion, which all in all produces a well predictable and continuous average. This basic standpoint widely observable (and also reflected in legal politics) in social sciences was considered to be general even though a paragraph in connection with crisis management is present – in an almost compulsory way - in the majority of the papers in the past decade. This wasn't any other way in the various fields of legal science either. However the expansion of the catalogue and tool system of rights made the lawmaker and the practicing lawyer: the erosion of compulsory verification seemed to have started with the persistence of peace. In the frames of this relativism, neutralism and value pluralism that was feeding on individualism overcame our law, and responsibilities seemed to have become residual items besides rights (see subchapter III.2. above). Moreover simultaneously "the model – appearing of economic nature on the surface - believed to be the condition of our [economic] prosperity failed".[71]

Phenomenona like globalisation, digitalisation, or even individualisation come together with the multiplying of risk factors, or with the words of Ulrich Beck the formation with the "global risk society". The escalation of risks becomes general following the effects of science and technology, in the field of relations between people and groups, social and international relations, and relations between the man and nature as well.[72] In connection with these, the conversation between players, partnership and de facto cooperation are appreciated during severe crises – that of course has consequences appearing in positive law as well.[73]

It is slowly outlined that the base for ideas of change regarding regulation solutions and contents cannot be the idea of prosperity to

71 Miszlivetz, Ferenc: Válság és demokrácia – 1989 öröksége. [Crisis and democracy – the heritage of 1989.] In: Simon, János (editor): *Húsz éve szabadon Közép-Európában. Demokrácia, politika, jog.* [Twenty years free in Central-Europe. Democracy, politics, law.] Konrad Adenauer Stiftung, Budapest, 2011. p. 134.

72 G. Márkus György: A harmadik út és a globális kapitalizmus megszelídítése. In: Dalos Rimma – Kiss Endre (szerk.): *Bal, jobb, harmadik út.* [Left, right, third way.] Friedrich Ebert Alapítvány, Budapest, 2000. p. 9.

73 Miszlivetz op. sic. p. 133.

which the Western law and administration theories were unexpressedly built on in the past 50-60 years.

Probably one of the most important questions of the past decades was that up to what extent can the narratives of the more or less unified transatlantic law and political order can be extended to the other two-third of the world. This suggestion became especially emphasised in the circle of expectations related to terrorism being handled by law, as such – seemingly theoretical - aspects analysed in this paper like the maintenance of law's operability, the "suppression of its negotiative feature" and eventually the need for "justice in content" have placed the classic and neoliberal law concepts and the expectations regarding the further expansion of them under extreme pressure already at the beginning of the 2000s.[74] And the crises after 2008 emphasise the tenable and necessary nature of these needs even more, however without being able to declare certain statements in connection with the existence and future of the unified transatlantic narrative(s)…

Anyhow – as a summary – it can be stated that while as a result of various crises – more intensive than before – the formation and strengthening of disaster recovery (legal) politics can be observed, at the same time there is a need for balance, conciliation and sustainable solutions greater than ever.

1.2. Strengthening of the natural law approach

The functional differentiation of the society is an experience for the modern man; the more and more obvious autonomy of the systems of politics, law, economy, science and also religion that meant strong challenge for the social theories as well, when they (should) have (had) to describe this world that became eccentric – meaning centerless.[75] The feature of the modern and "postmodern" social theoretical concepts conceived in the age without a central organising principle is that they

74 Bainbridge, Jason: Lawyers, Justice and the State. *Griffith Law Review* (2006) Vol 15 No 1. p. 170.

75 Cs. Kiss, Lajos: Bevezetés. [Introduction.] In: Cs. Kiss, Lajos – Karácsony, András (editor): *A társadalom és a jog autopoietikus felépítése*. [The autopioethical structure of society and law.] Budapest, 1994. pp. 7-8.

hardly or do not take note of the philosophical-moral nature of the human, and they are not inquisitive about the right social coexistence, order connected to social integrative forces and this way they give up the theoretical foundation of the functional social order as well.[76]

In early cultures law and religion typically formed a unified science complex that as a power organising knowledge material, with [sometimes] fading origin, through generations of further verbal demise ultimately identified itself as a gift from God.[77] In the formation of the current state of modern law and legal science, separation from the exclusivity of divine natural law – earlier - was one of the decisive effects: the transcendent (moral) verification of the validity of positive law created by human was profaned in the form of rational natural law.[78] Even though the urge to verify the validity of positive law with transcendent, so-called metajuristic (moral) principles was not eliminated, the verification problem itself was replaced to the dimension of the historicity of the non-created world.[79] Pál Kecskés writes: „When the conservativism of the historical-legal school that evolved in the world of ideas of romanticism considered the common law manifested in the historical folk spirit to be the source of positive law, by urging the historical method it significantly helped the evolution of legal positivism,"[80] that with the rejection of metaphysics – meaning the rejection of the existence and role of God - considered specific positive law the only existing and valid law (with that according to its standpoint the only underlying reason for the created regulations should be sought in the historical circumstances). In this approach the concept of law was narrowed down to the law used in material (positive) meaning, the only resultant of which and the only one entitled to the interpretation of it this way is the state and state will. [81]

76 Frivaldszky János op. sic. p. 382.

77 Juhász, Zita: De iure non scripto, avagy a korai jogfogalom duplexivitása. [De iure non scripto, or the duplexity of the early law concept.] De Iurisprudentia et Iure Publico 1/ 2011. p. 4. www.dieip.hu

78 Cs. Kiss op. sic. p. 8.

79 Ibid

80 Kecskés, Pál: Természetjog. [Natural law.] In: Szabó, Miklós (editor): *Natura Iuris*. Bíbor Kiadó, Miskolc, 2002. pp. 219-220.

81 Ibid

It is absolutely important to call the attention to that positive law itself has always had a double meaning: the religious concept that interpreted the nature in a metaphysic way was opposed to" the positive law originated in the new age (16th-18th century), interpreted in an enlightened rationalist way – or of laic concept - ", that gives a specific, empiric sense, and connects the concept of positive law to some sort of empirical characteristics (typically to instinct, some sort of easily recognisable need).

As the process of law becoming positive, and the functional separation of moral and law (morality and legality) progressed, starting from the strengthening of legal positivism that overshadows the natural law thinking, the following alternative presents/presented itself to the answer sought to the question of the "origin and nature" of legal validity: positive law acquires validity through a decision made in the frames of a goal rationally presumed (legal!) procedure, and is not in need of any transcendent justification outside of law, or the dependence on metajuristic (moral) principles, the external justification necessity exists.[82] *It is worth noting here that today we can witness the slow strengthening of natural law concepts* – interpreted in the broadest sense possible - *again*. In context with law positivism that still can be considered ruling the suggestion according to which "law as a momentum belonging to a norm and value system, needs the justification of its validity is lifelike; and that the changing world of positive experience cannot provide satisfactory justification could be hidden only until the philosophical spirit tied from one-sided scientific erudition regained its consciousness."[83]

The relation of the previous lawmaker to the concept of truth is the particular appearance of how morality and legality relate to each other, that appeared particularly in the Judicial Procedure Code (hereinafter JPC).[84] Article 1 of the old JPC contained that "the aim of this law is to ensure the decision on legal disputes arising in connection with the personal and material law of citizens based on the truth in court procedures". Article 3 ruled similarly, that stated that "The task of the

82 Cs. Kiss op. sic. pp. 8-9.

83 Kecskés, Pál op. sic. p. 220.

84 Act III of 1952 on Civil Procedure Code

court is to intend to uncover the truth according to the aims of this present act." On the contrary, the Article 1 of the new JPC accepted in 1999 - that was unchanged in name and numbering – is about the obligation of settling the legal disputes fairly, and the intention to state the truth was left out of the tasks.[85] Meaning the central element was now the fair nature of the procedure; we might as well say that in this legal concept the correct carrying out of the production of evidence, legality and legitimacy in a narrower sense become the crucial question, and not the objective – or in other words absolute – truth, in the detection of which the production of evidence is just a tool. The significance of this difference in the starting position is also rather great, even if the question is considered partially technical by some authors in the bibliography, originating it in the basic difference between civil and criminal justice.

Besides the undeniable welfare progresses, the increasing consumption and the expansion of human freedom rights, the 20 years left behind us are still burdened by problems that tension the society inside, the origin of which is worth to be sought in the weakening of the moral.[86]

One of the biggest enemies of *predictability* on a social level is that social and legal intention that confronts the traditional values, for example the institution of family or the expectation regarding the respect of the work of others – preferred by today's lawmaker as well – preaching some sort of pluralism. This perception is well summarised by the words of Frivaldszky: „It is not possible – appealing on the equality of cultures and multiculturalism - to consider for example the wide variety of sexual identities as "cultural difference" in their intentions,

85 For the topic see e.g. Dr. Földesi, Tamás: A jogban alkalmazott igazság terminusról és annak háttérbe szorulásáról a magyar polgári eljárásjog újabb fejlődésében. [About the truth terminology applied in law, and it being pushed back in the newest development of Hungarian civil procedure.] *Magyar Jog* 8/2003. pp. 467-473.; furthermore Kengyel, Miklós: *A magyar polgári eljárás.* [The Hungarian civil procedure.] Osiris Kiadó, Budapest, 2002. p. 86.; and Novák, István: Az eltűnt igazság nyomában. [In the wake of missing truth.] *Magyar Jog* 11/2001. p. 606.

86 Bús, Balázs: Morális rendszerváltásra is szükség van. [There is a need for moral system change, too.] In: Simon, János (editor): *Húsz éve szabadon Közép-Európában. Demokrácia, politika, jog.* [Twenty years free in Central-Europe. Democracy, politics, law.] Konrad Adenauer Stiftung, Budapest, 2011. p. 13.

need statements regarding the public sphere, meaning the legislation, as they are legitimate in their socially existing presence, and therefore they are equal to the traditional family whereupon they have to have the same legal protection as well. This is not only a natural law nonsense, but also doubts the family's moral role discovered and strengthened by sociology as well".[87]

The relativist and nihilist perception sets existing to be natural, and natural to be appropriate. Fake pluralism that wants to favour everyone relativises, and just the most important guarantees of law (general preventive effect, the moral standard character of law) get lost through this. The one entitled to make a decision – in the possession of any sort of majority – that does not have clear, persistent principle orientation that builds in common aspects will be likely to form moral pluralism to be of legal nature while representing it and to assist to the deterioration of social order in certain cases.

According to Miszlivetz, the currently dominant approaches, perceptions of democracy are basically elitists and are basically reduced to the rule of law and the questions of legality or are struggling in the trap of the one-sidedness of etatism. According to the interpretation that wishes to go beyond these approaches legality and legal procedural stability cannot form a democratic regime alone.[88] It is important to emphasise that among the concepts describing the common belonging of the members of today's – Hungarian – society an outstanding role is given to the expression *legal community* that, with a renewing content, is an increasingly defining element, component of social identity[89], moreover of state identity as well.

However the natural law direction of legal concept outlined today stands before us as a basically relative natural law argument that is strongly bound both in time and space, for as much as its point of reference is often nothing else than the direct pressure created by crisis, meaning the financial and other crises going on since 2008.

87 Frivaldszky op. sic. p. 384.

88 Miszlivetz op. sic. p. 142.

89 Szabó, Miklós: A jog alkothatóságáról. [Law's creation.] *Miskolci Jogi Szemle* 2011. évi különszám, p. 187.

However we should not think that the penetration of various natural law principles and ways of thinking into Hungarian law/legal life happened in the recent years only; this is a phenomenon that is presumable as a process, only the "strong thickening" of which can be observed in the recent period examined by us. Even the Hungarian compensation process after the system change was born from the "actualisation" of certain natural law principles,[90] for as much as the partial correction of the previous legitimate decisions could take place only because they were unfair and realised "arbitrary deprivation" in a legitimate way.

1.2.1. Christian natural law

How can the most generally perceived religion affect positive law the legal science that partly forms, partly explains that? As a starting point we can state that both – law and religion – are present in our everyday life as such norms, among the aims of which the regulation of desired individual and common behaviours, the sanctioning of activities against the norm and the statement of the other consequences of these appear as one. Ultimately the particular function of both is the formation and in some cases the strengthening of social cohesion and integration or social solidarity. It is an axiom, that certain types of norms strengthen and complement each other at best.

The newest natural law – optionally with Christian foundation and content – is new in a way that it does not trace the provisions of the positive law back to the creator of the legal material or the principles strengthened in "legal history" etc. but accepts the general principles and itemised expectations of the – worked out - system of belief, that has a wide social embeddedness – typically the Bible in our culture – as a direct justification and a necessary resultant of a certain regulation. Of course today it is still a hard question to decide whether the references to the identity of God, the relation to him and religious heritage[91] in

90 In details see: Dr. Prugberger, Tamás – Dr. Szalma, József: A természetjog és polgári jogi kodifikáció. [Natural law and civil law codification.] *Magyar Jog* 3/2003. pp. 129-139.

91 The preamble of the act XLV of 2010. Act about the testimony about National

the domestic and EU laws are just symbolic acts of the legal system appearing as „residual items" or the substantial formers of the legal way of thinking themselves?! Only the time gives answer to the measures but the direction of the change already seems clear. It is conspicuous observing the debate of the Fundamental Law that what a great number of references to Christianity and the Christian values appeared in order to support the raison d'etre of the certain principles and provisions. This particular *ultima ratio* role of Christianity also prevailed in the circle of clearing the concept of historical constitution, and it is also not a coincidence that in the debates evolved regarding the content of the preamble the two most often raised – and questioned - elements were religion and the Sacred Crown.[92]

Contrary to the Constitution, the Fundamental Law makes reference to religion many times. According to the strong value presenting character of the preamble most of these references can be found in the National Creed. Even calling the preamble itself "National Creed" refers to sacred charge[93] However even the National Creed is preceded by the first line of Hungary's anthem[94] („O Lord, bless the nation of Hungary"), so this way the first word of the Fundamental Law („Lord") is of religious charge.

The National Creed of the new Fundamental Law obviously and intentionally raises the central elements of the Christian religious moral to a constitutional level (belief, love), and article R expressedly makes compulsory the consideration of the Creed during the interpretation of the provisions of the Fundamental Law. The text in the first paragraph

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Belonging:„We, the members of the Parliament of the Republic of Hungary, who believe that God is the lord of history, and who that try to understand the course of history from other sources, for our country and the whole of the Hungarian nation, in the spirit of our responsibility set in the Constitution (...)".

92 See in details: Antal, Attila – Novák, Zoltán – Szentpéteri Nagy, Richárd (editor): *Az alkotmány arca: preambulum tanulmányok.* [Face of the constitution: preamble studies.] L'Harmattan, Budapest, 2011.

93 Horkay Hörcher, Ferenc: The National Avowal In: Csink, Lóránt– Schanda, Balázs – Zs. Varga, András: *The Basic Law – A First Commentary.* Clarus Press, Dublin, 2012. pp. 26-28.

94 Kölcsey Ferenc *Himnusz* című költeménye (1823) [The poem Anthem of Kölcsey, Ferenc.]

of the preamble also states, that Hungary is „part of the Christian Europe", and recognises the „nation preserving role of Christianity". Finally, after the Closing provisions, in the postamble it can be read that the "representatives of the Parliament define the Fundamental Law aware of their responsibility before God and man".

However, besides the fact of these arguments and the previously mentioned positive law occurrences we have to state that the majority standpoint today does not primarily presume the formation of the desecularisation effects and the post-secular society (Habermas) as a result of some sort of religious renaissance or a renewing religious life[95], but as a result of such strong political intentions, that express religious requirements and expectations in the public sphere and the various fields of the public[96] and also – let us add – in the constitutions themselves. The modern Hungarian legal system today is certainly not a system introducing positive law, but the interpretation of certain provisions of the Fundamental Law and certain further instruments and institutions of the legal system in a way of the Constitutional Court and others, moreover, the increase in number of provisions consciously and expressedly of Christian origin within the legal system, may mean an obvious imbalance.

1.3. Questions and answers regarding the new tendencies

Where are the sources of danger in the above said, in the law concept(s) that preaches the primacy of underlying principles and the priority of moral? There, where we get to the rather specific questions: e.g. how, why and what makes a public servant, especially the lawyer public servant patriotic? Can it be assured with regulation? How – through what techniques – is it possible to build the principles of Christianity into positive law? Directly (closely, by the adoption of the Bible's poems)

95 Nigel Biggar – Linda Hogan: *Religious Voices in Public Places.* Oxford University Press, 2009. p. 58.

96 Bassam Tibi: *The Islamist Shari'atization of Polity and Society. A Source of Intercivilizational Conflict?* Paper submitted to the Conference „Religion in the Public Space" CEU, Budapest, 2010. p. 1.

not, for sure. Is it possible to predispose for the acceptance and practice of these values, in a way that regulation generates institutional scenes where these values can be displayed? We can be absolutely sure that regulation running out in „lösung" is contra productive. It is a crucial aspect that even though for example some elements of the extremely severe and current roma problem in Hungary are strong in terms of their need of appearance, and most of the problems have been drawn up, it still can be stated regarding the whole of the Hungarian society that in the context of this circle of questions, the institutional and informal mechanisms that would make possible to practice the ability of social solidarity and participation and the more conscious experiencing of coexistence are mainly missing.

I have to refer to János Farkas, who says in one place that „it is not hard for a writer of [a] play to write in the screenplay that „grave-diggers come onto stage and occupy the audience for 10 minutes". The instruction is simple, but the problem that „how and with what it is possible to occupy the audience's attention? is even bigger (…), meaning the most difficult task is finding the technology of cases.".[97] The situation is the same in connection with building natural law (in certain cases Christian natural law) principles into the legal system: the visualisation (visibility) of these obviously does not primarily depend on the concept of the law or finding the appropriate legal technical solutions; much rather depends on the selection of values beyond the law and on the feature of the operation mechanism of social integrative institutions.

2. Tendencies coming from the change of the state's self-image

2.1. Emerging general features of the good state in the crisis

The importance of the requirements against the good state is overstated, and its necessity is emphasised by the fact of the crisis, the urging nature of management needs coming from the crisis. In the following lets go through on the one hand the aspects and institutions that the state cannot

97 Farkas, János: *A „szürke zóna"*. [The „grey zone".] Disputa Könyvek, Budapest, 1992. p. 24.

give up even during crisis, on the other hand those solutions that became necessary just because of the new nature of challenges; in many cases producing original institutions that did not exist before.

According to the conservative approach the state's foremost task is to be a source of authority; free economy and private ownership are just tools to maintain institutional order, and not goals alone.[98] After it became obvious that there are tasks only the state can fulfil, the standpoint according to which even the „limited state" cannot be weak state is well founded. Why the state should even be strong – according to the neoconservative argument? Primarily, because it has to control and maintain market order. The smooth operation of the market order is not nature's gift; it requires continuous attention and – if necessary – sturdiness from the state. In this approach the application of the state's coercive force could be legitimated the most if it is used „in the protection of the free economy".[99] In the state that wishes to accommodate to the new world order and the challenges of globalisation and is neoconservative in thoughts the government switches the traditional priorities of the „welfare state" to the preference of requirements of successful resistance in the international arena. Meaning that intention of involvement in globalisation becomes the guiding principle of the state. However this state does not only „suffer" globalisation, creating a passive-defensive attitude in connection with it, but it intends to participate actively.[100] This state consciously lets go the rigid discrimination of the public sphere and the market – however in the methods of connecting the two significant differences are shown between the various shapes. However we have to note that the previously mentioned activity could not only mean the alignment with the international actors, but also necessarily undertaking the conflicts – with the same actors - sharper than before.

98 Scruton, Roger: *A konzervativizmus jelentése.* [The meaning of conservativism.] Novissima Kiadó, Budapest, 2002. p. 39.

99 Egedy, Gergely: A neokonzervatív állam Thatchertől Cameronig. [The neoconservative state from Thatcher to Cameron.] *Politikatudományi Szemle* XIX/3. p. 32.

100 Egedy op. sic. p. 37.

The political ideology and the economic doctrine – that can be called neoliberalism and "market fundamentalism" – that strongly defined the past 20-25 years worldwide and existed in parallel with neoconservativism reinterpreted the state's social role among others. According to this interpretation the place of the state that already reached a crisis in the '70s and that can be called welfare from a social aspect, planner or intervener from an economic aspect, or business like – through the state owned companies – was/could be taken by the more efficient "regulator state". The regulator state tries less to increase social and economic welfare through direct income transfers, subsidies and the operation of state owned companies, it rather intends to create the institutional and regulation conditions that help the emergence of the market as the so to say most efficient allocation mechanism. In this approach the increase of social welfare could haven been interpreted primarily as the fruit of the improvement of efficiency.[101]

Today, as it was mentioned above, – in connection with the role of the state - the opinions that from the (New) Public Management state concept and the neoweberian state concept strongly argue in favour of the latter; for as much as they state that instead of the aspects of cost efficiency and result orientation etc. and the "dismissal" and "dis-magic" of the state coming from that, and the bigger and bigger outsourcing of state functions, the creation of a stronger and more active state should be pursued. Since it became more and more common from the '70s that various governments financed a wide range of welfare services, but they often assigned for-profit or non-profit organisations to the actual service activity. This way the expansion of welfare care was temporarily available without the substantial increase of bureaucracy.[102] Opinions about the success of the new public management have been different from the '80s: some considered it a miracle, while others pointed out

101 Boda, Zsolt – Scheiring, Gábor: A közszolgáltatások politikai értelmezéséről. [The political interpretation of public services.] *Politikatudományi Szemle* XIX/3. pp. 45-46.

102 Lester M. Salamon: The rise of the non-profit sector. *Foreign Affairs* (1994) Vol. 73, No. 4. p. 2.

that with the introduction of the new theory best case scenario is/was the saving of 3% of the costs of public institutions.[103]

New approaches also consider the maintenance of the requirements of the rule of law important, and the further enforcement of certain efficiency aspects, but they consider the substantial involvement of the elements of strategic thinking and strategic planning into public politics inevitable. Followers of the stronger state – that in the dispute about *good government* and *good governance* take sides more decisively in favour of the importance of the former – argue that *transparency, accountability and responsibility* that appear as basic requirements are only possible where the well rethought strategy of the cooperation between the state and the private sphere appears contrary to the uncertainties of for example outsourcing and PPP constructions that dismiss sharp boundaries. PPP construction proved to be especially unsuccessful in Hungary: the studies prepared by the Development and Methodology Institution of the State Audit Office of Hungary clearly showed that market research necessary for the foundation of the projects and the impact study about the opportunities of implementation were missing in the majority of the cases, moreover no economical and cost-comparison calculations were made (!); most of the specific constructions did not fulfil the elemental (classic) expectations – that had the state's interest in view – imposed on PPP investments either, for as much as during such an investment the implementation (construction), availability and operating risks (would have) had to be born by the investor.[104]

In connection with *good governance* theories it is unavoidable to state that this trend does/did not react to the problems coming from the Western-European development, but it is/was an artificial requirement system established for the developing world the primary aim of which is/was the increase of the subsidy absorbing and utilising capacity of

103 Hosszú, Hortenzia: Az állam szerepe a kormányzásban. [The state's role in governance.] In: *Államszerep válság idején* [State role in crisis.] (editor: Hosszú, Hortenzia – Gellén, Márton), COMPLEX Kiadó, Budapest, 2010. 51.

104 Bágér, Gusztáv: *A köz- és magánszféra együttműködésével kapcsolatos nemzetközi és hazai tapasztalatok*. [International and domestic experiences in connection with the cooperation of the public and the private sphere.] Állami Számvevőszék Fejlesztési és Módszertani Intézet, Budapest, 2007. p. 63.

the beneficiary countries, in a way that the "right" regulation methods of the relationship of the state and the society and the desire for the introduction of appropriate market mechanisms were defined, urging the takeover of the model compatible with the Western democracies.[105] Nevertheless, the expression *good governance* is a construction appearing in the description attempts of the features of Western countries' economic development as well.[106]

The most sensitive question in connection with the model of good governance is whether we interpret the concept of good from the result's or the process' side; as in the former case good governance will be the one that is most efficient in the allocation of public goods and enforcement of commonweal that raises how to handle efficient but not democratic models, forms of state (e.g. Singapore).[107] This dilemma arises especially sharply today – besides the expansion of neoweberian concepts strengthened by the crises - primarily in connection with the task of demarcation of public and private interest.

The most frequently mentioned element of the circle of concept of good governance is the program of managing democratic deficits that appears in various scenes; even the main goal of the document „About good governance" issued by the European Commission in 2001 was to transform the EU's governmental system in order for the European Union's institutional system to get closer to the European citizens through the coherence of common and community policies.[108]

2.1.1. Attempts of the good state in Hungary

Processes of the two decades (1990-2010) after the Hungarian system change can be characterised with even two paradoxes:

105 Hosszú op. sic. p. 53.

106 Bevir, Mark: *Key Concepts in Governance*. SAGE, Delhi, 2009. p. 95.

107 Hosszú op. sic. p. 53.

108 Torma, András: Hét tézis az EU és a tagállamok közigazgatása közötti kapcsolatról. [Seven theses about the relationship between the EU and the member states' public administration.] In: *Publicationes Universitatis Miskolcinensis*, SECTIO JURIDICA ET POLITICA Tomus XXIX/2. Miskolc University Press, Miskolc, 2011. p. 325.

1. The integration of the Hungarian economy into the world market happened without the convergence of the whole of the Hungarian economy.
2. The gradual weakening of the state and the failure of the substantial reform of the state budget together resulted in the formation of a territorially big, but not efficient state. „The Hungarian state model became too extended for night guard state and too weak for welfare state. This model could be mostly named „speed bump state" as it spreads along many fields of the economy and the society, but it is not present where its strength and organisational skills would be needed the most; it protects regarding its intention, but actually it rather breaks down the processes, wants to obstacle bad, but eventually it can be bypassed and stepped through".[109]

We can state that the „market turn" reduced to privatisation and outsourcing at the very end of the 20th and the very beginning of the 21st century did not result in real competition in Hungary. „Public institution monopoly was often replaced by private monopoly. The privatisation of public services resulted in the formation of a client system; outsourcing often became a source of the increasing of corruption. (…) So, the efficiency of public services was not increased significantly by the application of market mechanisms. The common thesis that private companies are more efficient in public services than public institutions was not justified by practice in any country in the modern world so far."[110] The embeddedness of these ideas was strengthened by that according to the neoclassical economic perception the state has to intervene only in the case of services – like home defence, education, public and asset safety, environmental protection etc. – where the market does not operate perfectly or at all. (…) Until recent times it was also presumed in Hungary that the tasks performed by the state are expressedly second-

109 Pulay, Gyula: Az éjjeliőr államtól a fekvőrendőr államig. Merre tovább? [From night guard state to speed bump state. Which way to go?] *Új Magyar Közigazgatás* 6-7/2010. p. 29.
110 Jenei op. sic. pp. 95-96.

class compared to tasks performed by private companies according to the instructions of the market.[111]

Of course the „rediscovery" of the state is also not a direction that can be absolutised; if the state solved all tasks through the central bureaucracy it could hardly avoid critics regarding the totalitarian – and what is at least as important, the less efficient – state. Basically this is the reason for the tasks acknowledged and undertaken by the state are just partly solved by the state itself, according to the principle of subsidiarity, and in many cases the state relies on the help of institutions of the economic and civil sphere and religious institutions.

An important fact that is not closely related to what I have said, is that such forms of state intervention can be possible that do not narrow the autonomy enjoyed in the private sphere, but – in certain cases – they expand it. The expansion, centralisation, lets say nationalisation of education, social and healthcare is typically like this. We see this direction being realised in all three fields in Hungary based on the current political commitments and regulation intentions (see later).

It also depends on the institutional features of the state (organisation system, features of internal decision making processes, characteristics of conciliation and conflict management mechanisms, the separate interests of those acting in the administration, resources at the state's disposal, etc.), whether it is able to overcome its boundaries set by the social relations, and to actively participate in the formation of them. We may find a significant part of the answers under the section of the so-called „*developing state"* section in the bibliography.[112] It was a widely accepted scientific and professional standpoint for a long time, that „In Hungary there is a need for a state that is self-limiting but powerful and is adjusting to the challenges of the 21st century, and is performing social

111 Csáki, György: A fejlesztő állam – új felfogásban. [The developing state – in new perception.] In: Csáki, György (editor): *A látható kéz. A fejlesztő állam a globalizációban. [The visible hand. The developing state in globalisation.]* Napvilág Kiadó, Budapest, 2009. pp. 13-14.

112 *A nemzetközi fejlesztéspolitikai stratégiakészítés gyakorlata*, [The practice of international development policy strategy making.] Kopint-Datorg Rt., Budapest, 2006. pp. 9–32.

management based of consequent strategy planning".[113] Balázs Kovács has already referred to that both the European Union and Hungary are in crisis regarding the field of development politics based on strategic planning when setting this thesis. Since strategic planning is not properly aligned with challenges, the made documents about development politics are characterised by the absence of social consensus and the development policy oriented planning is still at an early stage in the domestic public administration: the strategies providing base for planning are incidental and usually they were made in a not proactive way, because of external pressure, as an effect of expectations coming from the membership of the European Union".[114]

Today it can also be stated that the state's – abovementioned – consciously self-limiting character has significantly decreased, due to the various crises. Basically the current problems and perspectives of the developing state can be considered the consequences of the changed world economic environment and the globalisation. The especially problematic „moving" fields among the relations of nowadays world economy are for example the maintenance of the extended system of state subventions; the operation of commercial and foreign currency limitations; the substantial limitation of the penetration of transnational companies, the limitation of foreign investor's activity in the capital market[115], and recently the limitation of lending and borrowing.

The primary goal of today's developing countries to provide „decent standard of living" [116] for their citizens – based on Western models – becomes less and less maintainable, and also it can only be interpreted besides the revaluation of the role and weight of the developed world. Of course from the aspect of the world economic convergence to the countries of the developed centre in development, the significant decrease of the severe internal imbalances of the developing countries, the optimalisation of the profit to be obtained from external economic

113 Kovács, Balázs: Fejlesztő állam a XXI. században. [Developing state in the 21st century.] *Polgári Szemle* 4/2006. www.polgariszemle.hu/archivum
114 Ibid
115 Csáki op. sic. p. 31.
116 Csáki op. sic. p. 33.

relations, the developing state remains the most viable option in the third millennium as well.[117]

Magyary Zoltán Public Administration Development Programme – that made the intention of forming the public administration to be of national nature equal of the previously favoured efficiency aspect - became one of the frames, and the continuously renewing and "rephrased" base – beyond public administration – of the Hungarian government's ideas regarding the good state after 2010.[118]

2.2. Metamorphosis of the state. Certain theoretical questions of the performance of public duties

After 2010 the area for movement of the state was extended also because (majority of) human public service institutions which previously were operated by local governments – primarily in the field of health care and education – were (or will be soon) transferred to state maintenance.

In parallel with this the centralisation of the previously torn, hardly manageable system of specialised authorities is being performed; many specialised authorities which were independent earlier integrated into the metropolitan and county government office operating as regional institutions of the Government, and another important change is that the administrative tasks of local governments will be gradually shifted to newly establishable organisations; from 1 January 2013 approximately 80 types of cases will be shifted from the notary of the local government to the new district (in Hungarian: járás) offices.

According to newer approaches the new solutions of service organisations are not only forced by external conditions and market anomalies, but – beyond these – also the traditionally low efficiency of state/local governmental institutions.[119] It is an important question,

117 Ibid

118 *Magyary Zoltán Közigazgatás-fejlesztési Program*. [Magyary Zoltán Public administration Development Programme.] A Közigazgatási és Igazságügyi Minisztérium kiadványa, Budapest, 2012. p. 5.

119 Józsa, Zoltán: *Önkormányzati szervezet, funkció, modernizáció. [Organisation, function, modernisation of local governments.]* Dialóg Campus Kiadó, Budapest-Pécs, 2006. p. 78.

therefore, what effect the use of non-traditional organisational forms, within it the inclusion (or repeated exclusion) of the elements of civil and for-profit sector would have on the system of administrative organisations, the performance of public duties (with regard to the fact that the public organisations traditionally have competition hampering, monopolistic features).

Does the operation of these organisations endanger the unity, transparency, stability of the administrative institution system; if yes, is it necessary, despite this, to include them into the performance of public duties? Is the performance of public duties cheaper with the inclusion of for-profit and non-profit organisations? We may definitely state that expect for some exceptions – no! The inclusion is often not justified by the reason that it makes the performance of public duties cheaper – and through this, more effective – but the fact that the building and maintenance of society has some momentums beyond the law and some which are not necessarily influencable by law, such as the existence of the knowledge and skills of social solidarity, trust towards certain institutions – and unwritten norms, – networking making harmonised actions easier. Regarding the creation of social capital these may be even more important than the results of legislations and the conditions of financing. With regard to networking it shall be stressed that one central approach of the renewal of governance focuses on those networks which it views as the central features of modern governance.[120]

By today it has become clear also in Hungary that changes within the traditional administrative (public administration) institutional system did not solve the problems alone anywhere. The answer, therefore, is twofold, on the one hand the reinvention of the state is going on (the replanning of the catalogue of public duties and the replanning of the public task performer), on the other hand the performance of public duties, especially public services – which cannot be fitted into the scope of narrower public administration and system of tools – is realised through constantly renewing shape and type organisations, tools and methods. Naturally, it shall be added to the picture that the crises emerging after 2008 do not favour those ideas – popular also lately – which consider

120 Hosszú op. sic. p. 52.

instead of care taking forms based on high staff number institutions the transformation, „outsourcing" these to small communities better and necessary, from several aspects.[121]

2.2.1. Relationship of the state and civil organisations and their territory marked by law

Very different standpoints have been developed in the Hungarian literature regarding the features of entities that partly fill the territory between the state bodies and the narrower private sphere of the individual, and the boundaries of certain spheres (state, market and civil etc.). Many say many from Tamás Sárközy to Éva Kuti, they place the dividing and fault lines elsewhere, but all of them agree that the question is very important also from the aspect of the state's performance ability as well.

Until the middle-end of the 2000s the state received serious critique, saying that *„the efficiency of the state organisation and within that the governmental direction is low because of the hyper proliferation of the background organisations and the constant intention aimed at the creation of half-state fake civil organisations (public foundations, public bodies, public companies)".*[122]

While in the '90s and 2000s majority of the authors condemned the state overload and the negative effects of the mesosphere, saying that it weakens civil activity, the compellingness to self-care, etc., today most of the criticism refers to the openly expanding state that draws the public duties to itself. Otherwise, in the latter case it is only that the state – recognising that directly or indirectly it is almost a sole financer in many fields – leaves out the local governments and for or non-profit organisations from the task fulfilment and financing process.

Apparently a process – serving parallel and same goals – is going on, in the frames of which the state consciously reorganises the legal status and the subsidy system of the organisations of the civil sphere

121 Pfeiffer, Jan: A nagy létszámú intézményeken alapuló ellátási formák átalakítása Közép-Kelet-Európában. [Establishment of care systems based on high staff number isntitutions.] *Esély* 3/2012. pp. 7-14.

122 Sárközy, Tamás: *Kormányzás, civil társadalom, jog. [Government, civil society and law.]* Kossuth Kiadó, Budapest 2004. p. 5.

that have potential roles in the fulfilment of public duties. It is important regarding the civil creations, that

1. the modifying role of the local governments can decisively affect the future of civil organisations created near them;
2. churches, as financially supported entities that have a role in the fulfilment of public duties have been through significant decrease in number;
3. furthermore, such new creations like civil company[123] and social cooperative – that was created formally earlier, but gained substantial appearance now – received legal status as well (of course the latter is a partially market actor, but it is a type of organisation with classic civil criteria and with e.g. involvement in public labour as well.

We have to add that in Hungary the classification of civilians based on specific activity form and activity level (pressure group, QUANGO[124], national regional, local organisation, etc.) „does not have much importance, partly because apart from the chambers they do not have adequate regulations, and partly because theoretically all non-state organisations do all sorts of things".[125]

By the way we may call the QUANGOs in Hungary GUANGO, with a little word game – by merging the words *guano* and NGO – for as much as this organisation circle was „layered on" various social needs in a way that beyond a point – the financing and maintenance was made gratuitous – it left them behind, making the aspects of transparency, accountability and efficiency of secondary importance, or sometimes even less.

The feature (previous tendency), according to which the state imitates, reconstructs and substitutes the civil sphere, weakening that was already

123 The legislator introduced this form of association without legal personality in 2011. [Article 578/J paragraph (1) of the Civil Code: Natural persons may establish association for the facilitaion of their non-financial interest and for the harmonisation of their community activities without financial contribution (civil association).]

124 Quasi non-governmental organisation

125 Krémer, Balázs: Az NGO kultuszáról. [About the cult of the NGO.] *Esély* 2/1996. p. 50.

pointed out in several references. During the analysis of the issue it cannot be disregarded that the economic and sociological literature of the past one-two decades is mainly about that the state by undertaking the „replacement" and „simulation" of the market and self-regulating social mechanisms, and particularly the political organisation of the society, ultimately the state itself prevents the political decision processes meeting the actual interest fragmentation of the society.

Real social autonomies – due to their independence - are at least partly resistant to various external interventions. This – regarding the examined topic - provides opportunity for the formation of at least two statements: the existence of autonomy – at best – is independent of in what forms the institutional separation constituted by law is manifested, and the existence of autonomies cannot depend on the indirect or direct financial subsidy of the state. So, it is worth stating that besides ensuring e.g. the basic legal conditions of individual and organised common-like practise of religion and the protection guarantees, – *in religious life references in the narrower sense* – the state does not have any further institutional obligations to religious communities operating in any forms in Hungary, and no community can raise expectations towards the state regarding material subsidy, considering *just* its own religious character. In a given case losing the spiritual status[126] and the possible „total material impossibility" occurring as a result of that cannot be connected formally – even if we are talking about an unjustified withdrawal – since the primary basis of the viability of a civil-like creation cannot be the existence of state financing. The social fields that are viable beyond the need for autonomy have to be able to take care of their own basic means of sustenance besides creating internal regulations, customs and symbols, even when they are increasingly vulnerable to and at the mercy of regulations, decisions and other forces coming from the „bigger" world that surrounds them..[127] This logic is not in contradiction with the argument that states as an expectation that *the conscious state places emphasis on the predictable regulation environment and on working out the set forms of value terms commitment that supports the institutions of social solidarity, e.g. through the taxation system of the creation of the public benefit status.*

126 New act on curches

127 Gunther Teubner op. sic. 75.

Civil organisation – at best – creates institutional channel between the society and the state, transmit the society's needs and interests towards the state, on the other hand it forces the state to continuously legitimate itself, and to increase the publicity of its operation.[128] Civil society and political state cannot exist without each other, but both try to be superior to the other.[129] Even in a way that it expropriates the traditional institutions and classic territory of the other „party"… Therefore (and for the sake of completeness) we have to indicate that the dismissal and the narrowing of the state and its exile from certain fields previously mentioned many times was not a one-way, homogenous process in the past two decades either; since in this previous period, as a result of the change of the state's role consciousness and through its international obligations new tasks became public duties that were not undertaken before. One of the good examples for this is victim protection that appears as not only a public administration task, the regulation of which was missing earlier as well, and (almost) solely civil people fulfilled the certain tasks. However – with some simplification - the state penetrated into this field in the middle of the 2000s, temporarily superseding the dominant White Ring Association that was operating there earlier.

One of the final questions is how far the civil society can go in the participation of (political) decision making? According to the general view the presence is desirable and subservient only in the decision preparation phase that presents both informal and institutionalised forms. [130] It is important, that *the complete public negligation of the civil society* in Hungary *would mean the violation of norms that are less mature regarding the legal forms, but already exist in the form of political etiquette.*

128 Jagasics, Béla: *A nonprofit szféra elmélete [Theory of the non-profit sector.]* Landorhegy Alapítvány, Zalaegerszeg 2001. p. 5.

129 Konrád, György: *Az autonómia kísértése. [Temptation of autonomy.]* Antipolitika. Budapest, 1989. p. 17.

130 Sebestyén István: Civil dilemmák, civil kételyek a civil szervezetek (köz) életében. *Civil Szemle* 2004/1. 36.

2.3. New contents of norms created and maintained by the state

In the examined time period (after 2010) we may have witnessed the appearance, (re)vival, positioning in the legal system and constant communication of notions – which were hardly interpretable before as practical expectations or rules – such as, among others

a) *patriotism, commitment to the nation*. Within the scope of the examination of governmental intentions and possibilities this is one of the most exciting questions: how will the attitude of the public administration of tomorrow differ from today's and why? The condition for the establishment of a staff with proper spirit – and proper professional knowledge – is obviously the creation of a generally known, accepted and followed system of regulations, which, regarding its moral directions is unavoidable, thus has primacy compared to the necessarily secondary – though existing – regulatory content. If this is true, the following question rises: beyond the expectations stated in the law what further elements are needed for this?

b) state level sense of justice, which is also shown in „how the members of society interpret political phenomena and how they take the criticism of others" – state Veronika Takács with reference to Rawls. „If defeated by the sense of justice of the majority the government may even give up the protection of its unjust advantages. The sense of justice is a great social value the protection of which requires the cooperation of many."[131] The society „shall tolerate those somewhat disturbing behaviours [which differ from the system of values of the society], or shall fight against them with non-legal means".[132] The public law sanctioning of a behaviour violating public order may be justified only if „it becomes obvious that the non-legal means are not enough for ensuring lawful behaviour".[133] The real critical

131 Cites: Takács, Veronika: A polgári engedetlenség mozgalma. [Civil disobedience movement.] *Közpolitika* 2/2011. p. 6.

132 Kántás, Péter: A közrend elleni jogsértések természetéről c. doktori értekezés tézisei. [Thesises of Doctoral Dissertation 'About the nature of violations of law against public order.] Budapest, 2010. p. 4.

133 Ibid.

point is when dissatisfaction – due to the subjectively experienced „unacceptability" of the existing circumstances – oversteps the considerations of individual safety, like an anomy, and the retentive effect of calculable consequences related to expectations ceases to exist.

In the field of authority „everyday political failures" may be the significant and „structural" uncertainty falling on those concerned due to the operation of the given political sector, the inoperability of sanction system(s) and the „demonstration effect" caused by the massive, obvious violations of law which remained without consequences.[134] Among the main reasons of changes of laws and institutional changes after 2010 there are certainly present a major amount of needs which were formulated upon the political and street events of 2006, which had on themselves the contours of a sort of collective feeling of justice, resulting in the overwhelming victory of FIDESZ-KDNP at the elections of 2010.

c) *social solidarity*. It is obvious that the at least proper enforcement of laws and other norms – due to historical and other reasons – also in this field may only be possible through the establishment and facilitating of the development of conscious and initiative solidarity. The conclusion of this work is that the developer state does not only mean the improvement of the (concentrated) accessibility of different services and the higher level planning and publicity of certain authority functions, but also the priority of the means and institutions of social cohesion beyond budget rationality. In this the long term professional principles of certain authority fields have extremely important role, thus only the existence of these, and their validity which cannot be torn apart by changes of governments may ensure socially calculable development. At the same time we shall tell off the belief that the changes of law necessary bring about the changes of society (as well), as – referring back to the previous thought – only the *continuous representation of clear values* provide for real changes.

134 Hajnal op. sic. p. 49.

Naturally, law shall constantly offer its own results which clearly communicate the values of the majority, because *„no solid foundations can be laid for the safe functioning of the constitutional order without […] making a clear distinction between democracy and dictatorship, right and wrong, good and evil"* (Transitional Provisions to the Fundamental Law of Hungary[135] Preamble).

d) in general the shift of attention to *natural law thinking* (for details see subchapter IV.1.2)

In case of values and principles listed above the most important professional challenge is the dilemma that how these expectations – within the scope of regulation of certain life situations – may be put into practice, and what shall be done if the applicable provisions of itemised law get into conflict with these. The latter question may be formulated in a way that whether in a rule of law constellation it is possible – in the course of law enforcement and further legislation – to *consciously* represent interests against the all time valid laws? The Hungarian legal life after 2010 provides several examples that in the government there are intentions to answer the question positively. In addition to the many examples presented in this work it is worth mentioning one more: in July 2012 Máté Szabó, Parliamentary Commissioner of Human Rights draw attention to the fact that the limit of the number of students acceptable to higher education was set in the EMMI[136] contrary to the rules of the relevant laws. „The government shall withdraw its decision about the number of state funded students acceptable to higher education, and shall set out the limit of the number of students entering higher education in the academic year 2012/2013 in compliance with the relevant legal regulations" – this is what Máté Szabó, Parliamentary Commissioner of Human Rights requested the government to do. In relation with a petition the parliamentary commissioner started procedure ex officio in June 2012 about the significant reduction of the number of students acceptable to higher education. He held that the government did not comply with the guarantee provisions of the valid act on higher education, so far as those regulate that the limit of the number

135 Hereinafter referred to as Aár.

136 Ministry of Human Resources.

of students could differ from the number of the previous year with plus-minus 10%. *Upon the question of the parliamentary commissioner the same was admitted by the undersecretary of state responsible for education, but in this regard he referred to the realisation of the strategic goals of the government.*

"The Fundamental Law strictly declares that laws oblige everyone, thus also state institutions" – writes Máté Szabó. "During the realisation of factors, guidelines and goals defining the professional-strategic environment state institutions shall always act in compliance with the law. The decision of the Constitutional Court delivered in a similar question, upon the regulation regarding the number of students considers legislation unlawful if the content of a lower level norm was not defined in line with the provisions of the act carrying authorisation for its enactment." Based on this the parliamentary commissioner held that the guarantees of the act on higher education were not fulfilled during the enactment of the government decree, which caused controversies in relation with the principle of legal certainty, and through this with the right to education.

2.3.1. New contents of the meaning of public interest

Among new values and increasingly protectable aspects we have to mention especially the notion of public interest, the extraordinary role and materially new meaning of which entitles it to be presented – in a catalogised way – in a separated subchapter.

In case of any organisation – therefore also in case of the state – the „built-in Achilles-heel" of operation is the operational disturbance which may occur upon the primacy of individual (private) interests against public or community interests.[137] By examining the older Hungarian legal system – which existed before the summer of 2010 – we may state that the protection of individual interests is more sophisticated and realistic (thus more relevant in practice) than the abstract and ambiguous protection of public interest. The most extreme example of this „disorder of balances" is the *political (legislative) corruption*[138], the diagnosis of which is that market

137 Christopher Hood: *The Art of the State*. Clarendon Press, Oxford, 1998. p. 25.
138 Haász, János – Magyari, Péter: A pártok együtt számolták a kenőpénzt. [Parties counted the bribe money together.] 22 March 2010 http://index.hu/

players „wrote" the law, which were intended to serve their interests (e.g. in case of the Podolák-Fónagy modification).[139] Certain effective lobbies sometimes „overdid the expectations"; in the Hungarian Parliament it was not a one-time occasion when due to the involvement of serious economic (private) interests two or more – textually – identical proposals or modification proposals were submitted. Due to the „electricity-lobby", which was considered the strongest at the time there was a draft law to which two – fully identical – modification proposals were submitted, one from the representatives of the then opposition KDNP, the other from a representative of the then governing MSZP.[140]

Main directions of the protection of public interest in Hungary – after 2010

a) *making public finances more transparent and establishing further limits to the use of public funds* (for details see section I of subchapter IV.2.3.2)

b) *extension of the notion of public interest*

The regulation (or detailed regulation) of fields from which the state earlier kept out (or which it did not regulate thoroughly) belong into this scope.

ba) An example for this is the inclusion of the state support of „foreign currency debtors in trouble" into the scope of public interest, in parallel with the thorough regulation of financial institutions. From the aspect of our topic a significant and at the same time new attempt is the act LXXV of 2011 on the fixing of the exchange rates used for the calculation of instalments of foreign exchange denominated mortgage loans and the forced sales procedure of

gazdasag/magyar/2010/03/22/a_partok_egyutt_szamoltak_a_kenopenzt/

139 On 20 November 2009 János Fónagy and György Podolák MPs of MSZP submitted to the Parliament a package about the modification of fifty-seven sections, under the title „The modification of energy laws". Within sixty-six minutes the MPs voted positively on the modifications with significant majority. According to experts for the period between 2011 and 2015 the law increased the price of electricity with 12.7 billion HUF compared to the previous plans of the energy office – by the modification of the support budget of certain power plants.

140 Tóth, István János (ed.) :*Kormányzati kudarcok, járadékvadászat és korrupciós kockázatok a magyar villamosenergia-szektorban. [Governmental failures, allowance hunting and corruption risks in the Hunagrian electricity sector.]* BCE Korrupciókutató-központ, Budapest, 2010. pp. 141-144.

residential properties, together with the new act approved in 2011 on the final repayment of foreign currency debts – also on the modification of some acts related to the protection of homes – which provided for the repayment of foreign currency loans at 180 HUF/1 CHF and 250 HUF / 1 EUR exchange rate. The incorporation of idea(s) into an act means that the state, with retroactive force, overwrote the private law contracts made earlier between banks and debtors. On the one side there are the requirements of financial stability and legal certainty, while on the other side there might be the outlines of some kind of public interest, which, with regard to the significant changes recognised by law which occurred in the circumstances after the conclusion of the contracts – which make the performance of obligations almost impossible – justifies state intervention at unusual degree and depth;

bb) increased protection of community values

Act XXX of 2012 on Hungarian national values and Hungaricums states in advance that specific collections, national values, and the different level and characteristic of their collections, so-called value bases are established, which present new frameworks in the identification, systematization of national values, in the registration of their data, and in their continuous updating and maintenance.

bc) the clarification and detailed description of the content of certain responsibilities also belong to this field. As it may bee seen from below today's Hungarian law presents the regulation and sanctioning need of the state regarding the individual, the parent, the community, the local government and the state in a much broader scope than before (e.g. introduction of the notion of damages caused with legislation, increase of the level of expectations towards parents, etc.). (For details see subchapter IV.2.3.2.)

c) limitation of non-essential content of fundamental rights

ca) Another form, direction of expressing public interest and strengthen the mechanisms for the protection of public interest is the gradually increasing limitation of the „not significant content" of fundamental rights with respect to public interest.[141]

141 In its decision 22/1992. (VI. 10.) AB the Constitutional Court, based on

On 4 October 2010 approximately 700 thousand cubic meters, strongly virulent, dangerous mud spread over Devecser, Kolontár, Somlóvásárhely, Tüskevár, Apácatorna and Kisberzseny, because a retaining wall of a red mud container of the privately owned alumina factory in the close town of Ajka broke. The gravity of the catastrophe is well shown by the fact that the government first declared, then – upon the decision of the Parliament on 18 October 2010 – prolonged till 31 December 2010 the emergency situation in Vas, Veszprém and Győr-Moson-Sopron counties. As – one of the – normative answer(s) of the government given to the mentioned events act CV of 2004 on national defence and the Hungarian Army – within the scope of extraordinary measures applicable in environmental emergencies – was supplemented with the following Article 197/A: *"The operations of a business association may be brought – in line with those set forth in (3) – under the supervision of the Hungarian State. (2) In the name of the Hungarian State the undersecretary for public finances or a government representative may act. (3) The person defined in paragraph (2) a) reviews the financial situation of the business association, b) approves, signs the financial obligations of the business association, c) in connection with the avoidance of the situation which reasoned the introduction of the extraordinary measures and the alleviation of consequences decided in issues belonging to the competence of the main organ of the business association (…)".* It is important to mention that the provisions of the new act had (has) to be applied also in the ongoing cases. According to the reasoning of the draft law its goal was to create more effective possibilities of governmental intervention for more effective measures against catastrophes occurring in connection with the activities of certain business associations and for the alleviation of their harmful consequences. For this it became possible that – beyond the previous, liberal legal concept – the minister responsible for public finances or a governmental representative may supervise the operations and

the permanent practice of the body held that "the limitation of fundamental rights remains within constitutional limits if the limitation is not related to the untouchable essence of the fundamental law, if it is unavoidable, thus if it is forced, moreover, if the weight of limitation is not disproportionate compared to the goal which it aims at achieving."

activities of the given business association, based on the decision of the government.

cb) Based on Article 46 paragraph (7) of act CXC of 2011 on national education the enforcement of a student's rights shall not violate the interests of other students or the public, the public rights. The phrase according to which the child, during the enforcement of his rights shall not violate *"public interests"* describes the act's attitude well. Based on this undefined interest the right to participation in education, or the right to human dignity may be limited unilaterally. It is not just a theoretical possibility, which is shown by the fact that in the future school-age students may be banned from school based on this.

d) definition of public interest as national interest

Let us present here only one example (of the several available). The following is read in the Preamble of Act CXCIX of 2011 on public service civil servants: "A state, which is strong, not bigger than necessary, which is able to adjust to changes quickly and flexibly – which gives preference to national interests – may be based on public service which bears the appreciation of society, is effective and cost efficient, democratic, party neutral, operates lawfully, and it members have modern knowledge, they serve Hungary's interests and the public good impartially and with patriotism. Our aim is to facilitate the establishment of the value based civil servant professions based on strong patriotism."[142]

2.3.2. New concepts of responsibility

Responsibility of the continuous, constant recognition of the rules of social relations, behaviour in compliance with these; responsibility for behaviour, for its fitting into social relationships; the obligation of commitment for antisocial behaviours.[143] The next feature of today's Hungarian legal system cannot be separated from the – moral – issues which have been repeatedly analysed earlier: the new, system-based concept of responsibility. With some

142 Highlighted by the author (Á. R.)
143 Ibid.

simplification the key issue of conservative and neoconservative paradigm is responsibility, moreover, the revolution of responsibility, contrary to other – previously dominant – concepts absolutising freedom.[144]

In this new approach the citizen does not appear primarily as the addressee of rights and exemptions or as consumer, but mainly as responsible citizen (also in the expectations of laws), which took place in the new laws by the more thorough, more precise and sanctioned definition of different responsibilities.

A speciality of the regulation is that according to its intentions it appears at all possible levels and forms, moreover, it consciously increased expectations at all stages and situations: e.g. in the scope of state responsibility in addition to increasing its role in the performance of public duties it introduces the notion of damages caused with legislation. Even though financial prohibitions may be mainly mentioned with regard to state organisations, the so-called extra taxes introduced in 2010 and later with regard to market organisations, in the financial, the energy and the telecommunications sector may also be mentioned in this sphere. This new legal concept clarifies the responsibility of the individual from several aspects, and also beyond motivation for self-reliance; e.g. it defines the content of parental obligations more clearly.

If we examine the question from the aspect of governmental capacity, we shall definitely state that the comprehensive strengthening of different circles and levels of responsibility my ease, balance of the possible negative effects of the extension of the role of the state.

Let us analyse the separate spheres of responsibility systematically:

I. *Responsibility of the state*

In relation with the before mentioned red mud catastrophe in Kolontár the review, reconsideration and precise regulation of the responsibility of the state and its organisations became especially urgent. In my opinion the responsibility of the state – in general – may be raised in three – hardly separable regards:

144 Barát, Tamás: Felelősség – társadalmi felelősségvállalás. [Responsibility – social responsibility.] In: *Társadalom, gazdaság, jog, politika.* XXI. Század - Tudományos Közlemények, April 2012 (27.) p. 47.

a) the omission of authorities (in forms of responsibility for late performance of obligations, not or not properly performed inspection or supervision activities, in cases in which these had legal ground), or their mistakes (defaulted individual decisions);
b) in form of responsibility for missing legislation, missing laws, and for dysfunctional legal environment.
c) as question of responsibility beyond and regardless of the existence and content of laws: by examining the existence of moral, ethical extra responsibility of entities, institutions, persons embodying the all time power in a centrally organised society.[145] From the moral responsibility c1) political responsibility taking or c2) a form of mitigation of damages, compensation may emerge, which is not based on law, thus is mainly justified by the basic expectations of social solidarity, raised to the level of state politics.

Within the scope of responsibility of the state the newer Hungarian legal development performed the following precisions:
a) extension of the scope of tasks performed directly by the state
b) extension of liability for damages (damages caused by legislation): Article 6:547 of the New Civil Code prepared upon the Codifying Committee introduces the category „Liability for damages caused with legislation" into Hungarian law.
c) extension, precision of public finances liability
ca) The following may be read in Article N) paragraphs (1)-(3) of the Fundamental Law:
(1) Hungary shall enforce the principle of balanced, transparent and sustainable budget management.
(2) Parliament and the Government shall have primary responsibility for the enforcement of the principle set out in Paragraph (1).
(3) In the course of performing their duties, the Constitutional Court, courts, local governments and other state organs shall be obliged to respect the principle set out in Paragraph (1).

145 Rixer, Ádám: A vörösiszap-katasztrófa miatti felelősség. [Responsibility for the red mud catastrophe.] In: Szécsi, Gábor (ed.): *De iuris peritorum meritis 7 – Studia in honorem Endre Tanka.* KRE ÁJK, Budapest, 2010. pp. 27–28.

Article 36 paragraph (4) of the new Fundamental Law may be interpreted as attempt for increasing state influence of (public) finances and calculable – reliable – state operations; it reads as follows: *„[the] Parliament may not adopt a State Budget Act which allows state debt to exceed half of the Gross Domestic Product."*

cb) Among the most important act setting out the most important (financial) legal guarantees of the efficient use of public funds we shall mention (among the newer acts of the examined period) Act CVIII of 2011 on public procurements, Act CXCIV of 2011 on the financial stability of Hungary, and Act CXCVI of 2011 on national property.[146]

d) extension of the scope of responsibility and the prescription of specific activity:

da) Hungary – with respect to the togetherness of the united Hungarian nation – shall bear responsibility for the fate of Hungarians living abroad [Article D) of Hungary's fundamental law][147]

db) In relation with public finances Article 29 paragraph (1) of the Aár. introduced the following regulation: "*As long as the state debt exceeds half of the Gross Domestic Product, whenever the State incurs a payment obligation deriving from a decision of the Constitutional Court, the Court of Justice of the European Union or any other court or an organ which applies the law, and the amount previously earmarked by the Act on the Central Budget for performing such obligation is insufficient and the missing amount cannot even be supplied out of another amount earmarked by the Act on the Central Budget for other purposes without violating the requirement of balanced budget management, a special contribution to covering common needs shall be established, exclusively and expressly related to the performance of such obligation in terms of scope and designation.*"

146 For details see: Pfeffer, Zsolt: A közpénzek hatékony elköltésének pénzügyi jogi biztosítékai. [Financial legal guarantees of effective spending of public funds.] JURA 1/2012. pp. 88-93.

147 This provision of the Fundamental Law obviously does not create extraterritorial effect or force. About this see: Lóránt Csink – Balázs Schanda – András Zs. Varga (eds.): *The Basic Law of Hungary. A First Commentary.* Clarus Press, Dublin, 2012. p. 47.

II. *Deepening of responsibility through new expectations towards local governments*

Within the principles of the new local governmental system the main goal is to increase the responsibility and self-maintaining abilities of local communities, for example through the new public employment system or the limitation of crediting and the prohibition of planning of operational loss. [148] According to the plans the introduction of task financing will terminate the past practice according to which local governments considered all tasks "obligatory".

III. *Declaration and strengthening of the responsibility of communities*

a) Section 4 of the Transitional Provisions to the Fundamental Law of Hungary formulates the responsibility of one of the largest opposition party's of today's Parliament as follows:
The Hungarian Socialist Party, having gained legal recognition during the democratic transition, shares all responsibility which lies with the state-party, as the legal successor of the Hungarian Socialist Workers' Party, heir to the unlawfully accumulated assets and beneficiary of the illegitimate advantages obtained under the dictatorship or during the transition, and by reason of the personal continuity which linked the old and the new party and is still characteristic of the party's leadership.
b) by the strengthening of social partnership[s][149] motivation for community, initiative self-provision.

IV. *Responsibility of market organisations*

a) The topic of responsibility taking of market organisations, and in general the issue of social responsibility taking was limited to the

148 For details see: Hoffman, István: Átalakuló önkormányzati vagyon – az alkotmányos szabályok és a sarkalatos törvények tükrében. [Changing local governmental property – in light of fundamental law rules and cardinal acts.] *Jegyző és Közigazgatás* 3/2012. pp. 18-20.
149 For details see act X of 2006 on partnerships and on Government decree 141/2006 (VI. 29.) on social partnerships

CSR (Corporate Social Responsibility), i.e. the popular topic of social responsibility taking of organisations till the near past, and it was used only in a limited sense: it was intended to present donation, charitative activity and sponsorship offering competitive advantage. A specific field of responsibility of market organisations is the support of culture and within this, sport. Nowadays in Hungary, in the field of culture the financing system consists of several channels: in addition to central and local governmental funds – in forms of direct and indirect (e.g. tax allowances) support – the players of business and civil sectors also take significant part of the mecenature. Without going into details regarding valid laws I concentrate on examining one significant novelty in this field: from 1 July 2011 a new law entered into force according to which companies and entrepreneurs subject to corporate law may support the so-called „spectacular sports", among them football, up to the level of 70% of their tax amount.[150] Through this support football received significant sources for development. However, it is not impossible that this financing model will be introduced in other fields of culture – interpreted in the broadest sense – in the near future.

b) Within the examined scope the Hungarian regulations after 2010 established the new form of general and proportionate sharing of taxation – more balanced than before, adjusted to real financial results and possibilities – (also) through the introduction of the so-called extra taxes in 2010 and subsequently in the financial sector, the energy sector and the telecommunication sector.

150 For details see Article 22/C of act LXXXI of 1996 on corporate tax and dividend tax

V. *Increasing the level of individual responsibility*

a) Inclination, motivation for self-provision
According to Article O) of the Fundamental Law *„Every person shall be responsible for his or herself, and shall be obliged to contribute to the performance of state and community tasks to the best of his or her abilities and potential."* This is closely related to the intention to abolish decades old false public agreements: in shall be mentioned that – from July 2012 – the employment contract of the employee may be terminated also during sick-pay, which abolishes the decades long false practice (public agreement) of escaping into sick-pay – though which being supported by the state.

b) Increasing the level of special (role-related) individual responsibility
ba) e.g. within the scope of raising parents' responsibility Article 9 paragraph (3) point g) of Act CCXI of 2011 on the protection of families sets out as parental obligation that the parent shall be obliged to take care of the supervision of the child based on the provisions of a separate law, when the child is in public areas, bars and pubs at night, and according to paragraph (4) „the parent shall spend the support received after the child on the caretaking and bringing up of the child".
bb) A specific issue which is worth mentioning within the scope of special individual responsibility for the community is that for those applying for state funded or partially funded academic programs starting in September 2012 the conditions of receiving support is to sign to contract which is concluded between the student and the Hungarian state. In this the state undertakes to fully or partially cover the costs of the students' education (in form of full or partial state scholarship), while the students undertake to earn the degree within a given period of time, and to work in Hungary – within 20 years following the completion of studies – for a period of time which is the double of the time of studies, thus they „commit themselves to work for the Hungarian economy in a certain period of their life". In the background of this specific and quite new concept there is the consideration that the state finances the education of these students

(future professionals), thus it is the „obligation" and responsibility of the beneficiary towards the state and the community to return something from the benefits of his work to the environment which supported, „educated" him.

c) Renewal of responsibility for certain past acts: in Act CCX of 2011 on the punishability of crimes against humanity and the exclusion of their limitation period, and the punishment of certain crimes committed in the Communist dictatorship the Parliament confirmed its international law commitment according to which it considers the most serious international crimes exempt from the statute of limitation, and it enacted a law regarding the punishability of certain acts[151] committed and not punished in the Communist dictatorship.

There is a question which is raised more sharply than ever, namely that „what the content of the normative bond is which motivates people to be loyal to their political community".[152] In order to answer the question we have to step beyond the minimalist and individualist approaches, in which political integration only has instrumental value, i.e. it is described exclusively as a too of individual good[153] because the internal authorisation of legitimate rule of law power – at some degree and in an unchanged way – results from free, natural and necessary subjection, and is based on the free acceptance of/by subjects.[154] The members of

151 In the application of the act communist crime: crime committed in the Communist dictatorship, which at the time of commission was crime defined in the appendix of the valid criminal code (intentional murder, qualified acts of intentional aggravated battery, forced interrogation, unlawful detention, treachery and treason, treason against the territory of the Hungarian state and harbouring a criminal in relation with the mentioned crimes), which were committed in the name, on behalf or with the approval of the party state and about which no criminal procedure was conducted in the Communist era due to political reasons.

152 Bódig, Mátyás: Jogelméleti és politikai filozófiai reflexiók a közérdek problematikájáról. [Legal theory and political-philosophic reflections about the problem of public interest.] In: Szamel Katalin (ed.): *Közérdek és közigazgatás. [Public interest and public administration.]* MTA Jogtudományi Intézete, Budapest, 2008. p. 48.

153 Bódig op. sic. p. 49.

154 Zlinszky, János: A hatalomgyakorlás ellensúlya: Közigazgatási bíróság. [Counterbalance of power: Administrative court.] In: Varga Zs., András –

the community, due to their voluntary subjection, have responsibility towards each other for compliance with the jointly established norms, for law abiding behaviour followed in society. There is the obligation described in the old legal principle „*honeste vivere, neminem laedere, suum cuique tribuere*", i.e. to live decently, not to hurt anyone, to give everyone what they deserve.[155] A good state focuses on this, the responsibility towards each other, instead of (in addition to) loyalty towards the state.

2.4. Institutional transformation of the state

The political-legal analysis of the state's organisation and its institutionalised, traditional elements necessarily requires the review of the system of powers, either with regard to certain branches of power or regarding their „effect on each other", their finely tuned system of relationships. It is not the task of this work to evaluate *in details* the system of checks and balances existing in Hungary, the realisation and results of the division of power[156] comparing these with requirements defined in Western constitutional law.[157] Even though the significant transformation of the legal system – up to a certain degree – is the transformation of the state's organisational system as well, the aims of this paper do not require the introduction of these structures. This subchapter aims „only" at presenting certain significant changes – which occurred after 2010 – in the field of the traditional branches of power – and specifically in the field of executing power and justice. It shall be definitely stated that

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Fröhlich, Johanna (ed.): Közérdekvédelem – A közigazgatási bíráskodás múltja és jövője. [Protection of public interests – Past and future of administrative courts.] Op. sic. p. 67.

155 Zlinszky op. sic. p. 68.

156 Naturally, Hungary was also affected by different debates, for example by the one which emerged about the contraction or separation of regulatory institutions operating in the field of media and communication. About this see: Rozgonyi, Krisztina: Hatóságok konvergenciája: össze vagy vissza? [Convergence of authorities: this or that?] *Infokommunikáció és jog* 3/2012. pp. 127-128.

157 Lásd pl. R. C. Van Caenegem: *Bevezetés a nyugati alkotmányjogb*a. *[Introduction to Western constitutional law.]* Magyar Közlöny Lap- és Könyvkiadó, Budapest, 2008. pp. 33-45.

even though this work repeatedly refers to the fact that in the examined period within the whole state-political system the number and weight of institutional-legal counterbalances (guarantees) seems to be decreasing, there are counterexamples, as well, which in certain significant fields create or renew substantive control mechanisms. Among the latter ones the quasi veto power of the Monetary Council[158] may be mentioned, in relation with which the Fundamental Law of Hungary states in Article 44 paragraph (3) that *„The adoption of the State Budget Act shall be subject to the prior consent of the Budget Council (…).”* Act CXCIV of 2011 on the economic stability of Hungary adds that draft laws containing the modification of the budget – which would modify the main income or expenses numbers of the budget or would increase the rate of budget deficit – may be put on final vote only with the previous consent of the Monetary Council. The significance of this institution is based on the fact that in 2012 one time the Council refused the approval.

2.4.1. Transformation of the Hungarian public administration

The transformation of the system, tasks and authority of the state bodies occurred after 2010 in the public administration in Hungary is the most spectacular. Lets see the most important fields one after the other:

In the process of the transformation of the Hungarian municipal system act CLXXXIX of 2011 on local governments (hereinafter: Mötv) that was accepted in 19 December 2012, that enters into force between 2012 and 2014 in three steps, is of great importance. The basic goal of the act is the building of a modern, cost-effective, task oriented local government system, that provides opportunity for democratic and effective operation, and at the same time – in a way that enforces and protects the citizens' collective rights to local governance - it sets stricter frames for municipal autonomy.[159]

158 The Monetary Council gives opinion about the draft act on the central budget, but may also give opinion about any issues related to the planning, execution of the budget, the use of public funds and the situation of the public finances.

159 Dr. Békényi, József: Megújult a magyar önkormányzati rendszer. [Renewed Hungarian local governmental system.] *Jegyző és Közigazgatás* 1/2012. p. 6.

In Hungary, as response to the centralisation of the council system, the previous act on local governments[160] practically created independent branches of power, giving independence to all townships, besides minimal central control. The operation of the local governments did not become efficient as a result of this, many townships became indebted and the fulfilment of tasks became low quality: „(…) the act on local governments accepted in 1990 had expressedly negative consequences regarding the regulation of the middle level especially."[161]

Based on the current changes two-third of the local governments' public services will be centralised and the majority of the public administration authority of the local governments will be eliminated. So in the future a much stronger central administration control will be applied.

One of the most important changes is the substantial integration of the territorial public administration, that wished to give an answer to one of the most urgent problems of the past twenty years of the Hungarian public administration: Since 1990 every government of the period tried to stop and turn around the tendency of the a high degree fragmentation of the regional public administration professional management organisations, but the attempts failed in every case, or had fragmentary results before 2010.[162] Following the unsuccessful regionalisation after 2002 the public administration offices operating as the regional body of the government were reorganised to the county level and the creation of the capital and county governmental offices on 1st January 2011 put an end to a two decade disintegration process (see act CXXVI of 2010 on capital and county governmental offices and amendments of law in connection with the creation of capital and county governmental offices and the regional integrations). The integration affected 14 organisations (types

160 Act LXV of 1990 on local governments

161 Pálné, Dr. Kovács Ilona: A középszintű önkormányzás változó trendjei. [Changing trends of middle-level selg-government.] Új Magyar Közigazgatás 10/2011. p. 25.

162 Virág, Rudolf: Az államigazgatási feladat- és hatáskör-telepítés új rendszere – a járási rendszer kialakítása. [New system of state administration tasks and competences – the establishment of districts.] Magyar Közigazgatás 1/2012. pp. 11-12.

of bodies) and more than 150 bodies within that[163], resulting in serious cost savings already in the first year.

The creation of the governmental offices developed as tools of centralisation was followed by the consolidation of the county municipal institutions: the state took over the significant debt stock accumulated by the county local governments from 2011 and later it took over the maintenance of the institutions of county local governments. For example from 1st January 2012 the capital and county hospitals became under the maintenance of the Pharmaceutical and Healthcare Quality and Organisation Development Institution (PHQOI) the central office managed by the Ministry of Human Resources (previously the Ministry of National Resources). All the city hospitals providing inpatient care were taken over by the state until 1st May 2012, and until 1st January 2013 city hospitals and outpatient clinics will be taken over as well. These healthcare institutions will be/are managed by PHQOI as well. The other – not healthcare – institutions were integrated by the county institution maintenance centres, the County Institution Maintenance Centres (CIC). The circle of about 700 institutions involved budget bodies, economic companies and public foundations.

Very important changes occur(ed) in the Hungarian public education as well; in connection with which the most frequently mentioned issue is the centralisation and the *quasi* nationalisation of the public education. It seemed for a long time that the full nationalisation of the public education institutions will take place, but the new legal regulation – through dividing responsibility and resources – replaces the tasks in connection with operation (management and maintenance) to local governments instead of total nationalisation. The representatives of the state expect the predictable use of resources, the decrease of the educators' material and other type of vulnerability and the increased enforcement of professional aspects from the new system that enters into force in 2012.

In local-regional administration several further, significant novelties have been introduced: in the relationship of central state organisation

163 The contraction affected about half of 33 regional – partly county, partly larger regional – state administration authorities.

and local governments it is a significant difference that instead of the previous – less strict – legality monitoring the so-called legality supervisions will be introduced from 2012, significantly broadening state control.[164] Within the scope of this relationship we shall stress that in case the local government fails to enact a local governmental decree (to which it is obliged by law), the metropolitan or country state offices (!) may enact the decree.

Another change is that while from 1990 the previous legislator named as addressee of majority of state administration tasks and competences the notary (who operated as organ of the local governments), the districts, which will be formed as of 1 January 2013[165] will realise the separation of state administration tasks into separate organisation, separating more than before – also organisationally – state administration tasks belonging to the competence of the government and local governmental tasks belonging to the responsibility of local governments.[166] The state administration authority competences of notaries have always been broadened, and this extension was not always followed by the provision of necessary financial sources and other conditions.[167]

From 2013 175 county district offices and 23 capital city district offices will be formed as branch-offices of government offices. District offices will be responsible for certain state administrative tasks – which earlier belonged to the notary of the local government, – and the local organisations of the capital and county government offices' specialised organs will also form part of the districts.[168] For example, tasks related to

164 Article 34 paragraph (4) of the Fundamental Law of Hungary introduced – in harmony with Article 8 of the European Charter of Local Governments – the legality supervision of local governments as of 1 January 2012. The detailed rules may be found in Chapter VIII of act CLXXXIX of 2011 on the local governments of Hungary.

165 The government decided about the conceptual principles of the establishment of districts with Government decree 1299/2011 (IX. 1.)

166 Virág op. sic. 15.

167 Dr. Szekeres, Antal: A jegyző államigazgatási hatásköreinek változása. [Changes of the public administration competences of notaries.] *Jegyző és Közigazgatás 3*/2012. p. 5.

168 About the details of modifications see act XCIII of 2012 on the establishment

the management of documents will be transferred from the notaries to the districts (such as address registration, passport management, vehicle registration), immigration control tasks, child welfare and child protection tasks, part of social services in which the local government does not have individual power of discretion, and majority of environmental issues; while the notary keeps probate actions, the registry duties, the first instance building authority tasks, industrial and commercial permissions, part of social services which are related to non-subjective allowances, local tax management and e.g. task related to ragweed.[169] However, it shall be stated that the reorganisation of tasks and competences has been ongoing regardless of the establishment of districts, it is enough to refer to the fact that infringement procedures were placed from notaries to metropolitan, county government offices from 15 April 2012. In the district offices – in addition to main offices – the following specialised organisations will operate: district child welfare, district animal health and food inspection office, district land registry, district labour office, and public health specialised office.

Together with state administration duties the district offices overtake from the mayor's offices the civil servants responsible for the mentioned fields, their relationship will be transformed into governmental service relationship. It is a very significant development that Js will overtake not only the employees, but also the movable and immovable assets necessary for the performance of the duties, these will be transferred to the free use of the state, the property manager will be the government office. It also belongs to this issue that according to Article 38 paragraph (1) of Hungary's Fundamental Law the property of the state and of local governments is national property. In 2011 the Parliament approved as cardinal act the act CXCVI of 2011 on national property (Nvtv.), and with this state and local government property received unified regulation which is unprecedented in Hungary, and which at the same time provided

of districts and on the modification of some related acts, which was approved by the Parliament on 25 June 2012

169 For details see Act XX of 1991 on the Tasks and Scope of Authority of the Local Governments and their organs, of the Commissioners of the Republic, and of Certain Centrally Governed Organs

for the distraction of the property of local governments. According to István Hoffman „Instead of the previous strong constitutional protection with the obligation of the performance of tasks the property of local governments became a sort of target property, which moves together with the modification of duties and competences, therefore with the modification of the obligee of the duties changes may occur also in the property situation, - but at the same time no obligatory compensation claim is established [towards the local governments].[170]

Actual case management will be possible in the government windows operated as part of district offices, open all around the country from Monday to Friday from 8 am till 8 pm, or at the so-called case assistance appointed to the settlement from 1 January 2013. It is important that in this system the client may manage his cases not only at the centre of the J, but at all settlements which operated document bureau earlier. In the new system the civil servant who gets into contact with clients (at about 300 integrated client service points) will not participate in the substantial management of cases which cannot be settled immediately, and therefore the actual management of the petitions submitted to him will happen at the relevant specialised organisations. This, naturally, does not exclude the possibility that the client may get into direct contact with the actual manager of his case, but according to the plans this will further accelerate the procedures.

2.4.2. Certain theoretical issues of the reorganisation of public administration – in general

Despite the before mentioned significant changes it shall be stated that questions which seemed to be in focus of the literature of administrative law in the past decades (Hungary's administrative territorial division; region-county-small area; levels and institution types of central public administration) are partially phantom questions, as in a family with two children the descenders' situation may be critical, while a family of four generations living under the same roof may provide excellent emotional, spiritual and physical development, completion to its members. As in

170 Hoffman op. sic. p. 20.

a family the individual success of members, in public administration the function maturity of levels and units is guaranteed by the proper division of tasks, a clear system of processes defining the related individual relationships, and the system of relationships which is accessible and contains conscious and emotional elements. From this aspect there is a more important question, namely whether the reassuring regulation of public contracts and public administration contracts, the comprehensive settlement of public procurements, the establishment of further guarantees against corruption, etc. has been established; thus whether those fundamentally important institutions are created which in fact can bear a very high – and certainly of eclectic style – building.

Even though in the primary sources of EU law there are only few specific provisions which would prescribe direct rules for the structure and operation of state organisation, more precisely the public administration infrastructure of member states, it is undoubted that „it is constantly, broadly and more and more intensively having effect on it: through the *acquis communautaire*, the community achievements in a quasi implicit way, while through the EU law, and primarily through Article 4 paragraph (3) of the TEU[171] also *expressis verbis*", so far as the latter requirement formulates the obligation (result obligation) to enforce EU law, which cannot be understood in any other way than the public administration of member states shall be reliable, transparent and democratic.[172] Continuing the above mentioned – family – example the significance of „personal example" shall be stressed, which is regulated in Article 197 of the TEU under the title *administrative cooperation*. [173]

171 TEU Article 4 paragraph (3) Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.
172 Torma op. sic. p. 317.
173 TFEU Article 197

It is obvious also within the transformation of local-regional administration that e.g. the modification of the frameworks of local governmental system may be complete only in relation with the renewal of other elements of the state organisations, as well as with the reform of big care systems,[174] thus the reconsideration of each element of the system – with regard to each other – may bring about permanent results.[175]

2.4.3. Certain theoretical issues of the reorganisation of authorities

The review would not be complete *without outlining the most important theoretical and institutional questions of today's authority, especially that the all time dysfunctions of public administration, its manifested operational disorders usually become most obvious in this field, and at the same time attempts made at changing the situation are tested here first.*

The events that took place on the streets of Budapest in September and October 2006 confirmed the long suspected – and in other relations already proven – truth that it is impossible to leave past behind with „one great jump". The frequency of protests, as well as their forceful or forceless conduct, furthermore, the application of sanctions by authorities, namely the police against protesters, police violence may be

(1) Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest.
(2) The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish the necessary measures to this end, excluding any harmonisation of the laws and regulations of the Member States.

174 In addition of the above mentioned reorganisation of the great systems of health care and education the new regulation of Hungarian pension system shall also be mentioned: after 1 November 2010 it was not possible to pay private pension contribution any more, in parallel of which the rate of pension contribution to be paid to the state increased.

175 Dr. Bekényi op. sic. p. 6.

indicators of the stability of democracy, the institutionalisation of the freedom of assembly and of expression." (Máté Szabó) It may be stated that the guarantee of the democratisation of police by the institutions of law, politics and publicity proved to be insufficient in Hungary after the change in the political system (the events of 2006 drew attention to this). This statement may be proved also if one of the most neuralgic point of authority operations is the obligation of enforcement of orders, even if they are unlawful, which results from military principles.[176] It is not a coincidence, either, that the intentions of the European Union in the field of authorities mainly concentrate on ensuring fundamental rights,[177] on strengthening their guarantees, and on preventing emerging legal and organisations barriers; on the establishment and continuous operation of member states' cooperation.

As existentialist philosophy assumes, the real character of the individual may – often – be shown in the border situations of life; similarly, the democratic commitment of certain authority cultures and the persons composing them may be measured only in the non-planned, sudden – sometimes cataclysm-like – events requiring skill-level response. Each such situation, at the same time, is great opportunity for organisational learning and for gaining individual experiences in form of rational and moral basic truths. Phrasing it in the opposite way, and carrying on the opinion of Elemér Hankiss, according to which even in the decades of state socialism the deep structural continuation of certain civil values may be observed,[178] it may be stated that signs referring to the survival of certain previously popular values may be observed also in the past two decades – as heritage of state socialism. As Péter Kántás put it (merely in theoretical approach) „the authoritative, ambiguous notions – such as public order – survived the police state and due to their substantial

176 Christián, László: *A rendészet alapvonalai, önkormányzati rendőrség. [Outlines of authority, self-governmental police.]* UNIVERSITAS – Győr Nonprofit Kft., Győr, 2011. p. 135.

177 Nowadays several authors include into the conceptual elements of state as fourth factor – in addition to area, population and power – the criterion of the enforcement of universal human rights norms.

178 Hankiss, Elmér: *Diagnózisok 2. [Diagnosises 2.]* Magvető Kiadó, Budapest, 1986.

undefined nature they may become serious weapons within the rule of law public administration in the hands of law enforcers".[179]

In summary it may be stated that the regulation of authorities and especially of authority procedure(s) in Hungary is – still – in significant arrears compared to the material and procedural regulations of other administrative fields.[180]

2.4.4. The reorganisation of Hungarian justice system

2.4.4.1. Appreciation of the role of the justice system

In relation with legislation it may be stated that „The legislator makes the general rule, but several situations exceed this rule. One possible, though rather scary answer to this is casuistic, when the legislator tries to regulate every possible scenario in advance. The other answer is the constant modification of laws, which contravenes with one principle of the rule of law defined by Locke, the requirement of the existence of permanent, but at least long-lasting laws. The third solution – evident for and favoured by conservative legal approach – may be the judicial development of law."[181] Today's legislator seems to be departing into all three directions at the same time. The constant increase of the number of legislative products, the modification of laws performed at extraordinary speed, and the *precedent-like nature* of law are tendencies which can be each supported based on new legal instruments.

With regard to the latter one it is an actual question in the present Hungarian legal literature whether – even theoretically – it is possible to have and apply in parallel a special precedent law and the law of codes.[182]

179 Kántás op. sic. p. 2.

180 About this see e.g. Szikinger, István: A rendészeti eljárásról. [About law enforcement proceedings.] *Rendészet és emberi jogok* 2/2011. pp. 29-35.

181 Paczolay, Péter: *Alkotmány és történelem. [Constitution and history.]* Elhangzott a Történelemtanárok 21. Országos Konferenciáján Lecture given at the 21st National Conference of History Teachers – 8 October 2011, Kossuth Klub. [hereinafter referred to as Paczolay (2011)]

182 Szalma, József: A precedensjogról. [About precedent law.] *Új Magyar Közigazgatás* 11/2011. p. 37.

Among the reasons of the increase of the role of adjudication and the increase of the value of judicial activates the following factors shall be mentioned.

1. *Establishment of a multi-layer law*. The disorder of coherence resulting from the interaction of EU, international and national law developed a need for the increasing role taking of judges. This is also an international tendency.
2. *Accelerating legislation and quickly obsoleted laws*. Disorder regarding the real content of law may occur not only upon the interaction of the above mentioned layers of law, but the too quick changes, the accelerated modification pace of otherwise coherent regulations overestimates the role of the judge applying the law. (For this see those written about the phantom pain of the law in subchapter VI.3.7.)
3. Due to the high level of fusion of legislative and executive power the role of justice – as counterbalance – is appreciated. Even though different justice reforms made attempt to extend political and legal control, the relative independence[183] of this sector – averting direct forces emerging in individual cases – still remains in Hungary.
4. Article 28 of the Fundamental Law may enable the law enforcer (judge) to refer directly to the Fundamental Law. Focusing on the objective teleological interpretation may move the judge – as decision maker – towards a quasi legislator role.
5. The preliminary „pricing" of changing principles as principles and tool of interpretation in the legal system – primarily in the Fundamental Law – is less possible (e.g. the expectation of behaviour paying attention to the achievements of the historical constitution, the consideration of the interests of future generations, the consistent enforcement of the requirement of soundness the may increase the uncertainty of legal practice, and not only because these are relatively new elements in the legal system and legal life: it seems as if the legislator was consciously widening more than ever the scope of aspects which may be and shall be considered during law

183 In this sense with independence I mean the organisational (corporative) independence, which means the independence of the judiciary, the separation of judicial power from the other branches of power.

enforcement, at the same time broadening the area of movement of the judge.)

Here it may also be mentioned that the opposers of moral, value-based interpretation usually refer to the widespread reason according to which with this interpretation judges present their own personal moral views as part of the constitution.[184] The real danger – obviously – is if „under the mask of moral there is the politicisation of law."[185]

6. With the introduction of real constitutional complaint, thus with the possibility of directly object to and annul public authority decisions specific, individual level legal protection shall become more effective. The Constitutional Court receives a competence according to which in individual cases it may annul the court decision without abolishing the underlying law (without becoming part of the strictly viewed court system). It is a just assumption that through this constitutional principles and values directly affect the legal system as a whole.[186]
7. The improvement of the conditions of judicial activities also improves the quality and speed of law enforcement and deepens public trust. On 28 November 2011 two acts were approved which placed the Hungarian judicial system on new grounds: Act CLXI of 2011 on the organisation and management of courts (herein after referred to as: Bszi.) and Act CLXII of 2011 on the status and remuneration of judges. The biggest change undoubtedly happened in the management of courts: the National Justice Council (OIT) was replaced by the National Office of Judges (OBH), and its more effective decision making mechanism. In the previous system the practise of dividing judicial positions was extremely problematic and institutionally limited, and this lead to the result that significant (!) differences emerged between the amount of workload of certain courts, especially at the expense of the Metropolitan Court of Budapest and the Pest County Court.[187]

184 Csink – Fröhlich (2012a) p. 82.

185 Csink – Fröhlich (2012a) p. 83.

186 Csink – Fröhlich (2012a) p. 100.

187 Osztovits, András: Az új magyar bírósági szervezetrendszer. [The new Hungarian judicial system.] In: Rixer, Ádám (ed.): *Állam és közösség. Válogatott*

8. The existence of certain new legal institutions, in case they broaden the area of movement for the judge. We may consider as such e.g. the measure regulated on the new Penal Code, Article 63 paragraph (1) and Articles 67-68 of Act C of 2012 on the Penal Code on the so-called reparation, which may be applied individually, instead of sentence.

Naturally, many factors (seem to be) contradict(ing) the before mentioned: the legal socialisation of majority of law enforcers, the limited professional independence within the organisation, and the hardly separable performance evaluation aiming at objectivity (and significantly affecting promotion) have counter effect on the precedent law-nature of the legal system, which, on the other hand, is against independence and „creativity", which in addition to the excessive repression of subjective elements prefers many indicators such as the number of overruled cases or the speed of finishing the cases. These are specific „organisation sociological" barriers, which are in front of the increase of the role of the judge, provided for by the legal system. Another significant aspect is that Hungarian legal education does/did not necessarily socialise law students along this legal concept.

2.4.4.2. Renewal of constitutional adjudication in Hungary

In this chapter constitutional adjudication has been already mentioned, but it is worth summarising the main changes and new questions in brief.

Article 24 of the Fundamental Law dealt directly with the Constitutional Court, the competences of which are regulated by this article and Article 37 paragraph (4) on public finances. The a) abolishment of a former form of actio popularis, the b) narrowing down of the scope of initiators of subsequent norm control[188] and contrary to this c) the introduction

közjogi tanulmányok Magyarország Alaptörvénye tiszteletére. [State and Law. Selected public law essays in respect of the Fundamental Law of Hungary.] Lőrincz Lajos Közjogi Kutatóműhely – KRE ÁJK, Budapest, 2012. p. 381.

188 According to Article 24 paragraph (2) point e) ot may be initiated by the Government, one-fourth of MP sor the parliamentary commissioner of human

of real constitutional complaint, and d) the limitation of subsequent norm control, constitutional complaint and judicial initiation against and annulment of certain laws related to public funds are the main changes.

With the introduction of real constitutional complaint, thus the possibility of direct overruling and annulment of public authorities' decisions the concrete, individual level protection of rights becomes more effective. The Constitutional Court receives the possibility of annulling exclusively the original court decision made in an individual case without establishing the unconstitutionality of the law in subject.

Based on the article of Tushnet [189] it is worth referring to the fact that the general competence of the Constitutional Court within which it can submit the whole of the legal system to the aspects of constitutionality is very important for the actual enforcement of the constitution.[190] Subsequent abstract norm control and the competence for annulling the laws which are contrary to the Fundamental Law are definitely needed for the protection of democracy and due to aspects of the protection of the rights set forth in the Fundamental Law.[191] *In the new system there are two new ways for the abstract examination of a norm:* a) subsequent abstract norm control which may be initiated also by the parliamentary commissioner of fundamental rights, within which the norm may be examined at the Constitutional Court through the aspects of constitutionality, after examinations upon conditions elaborated by

rights. According to Article 26 paragraph (3) „The Prosecutor General may request the Constitutional Court to examine the conformity with the Fundamental Law of legal regulations applied in concrete cases tried with the participation of a prosecutor with regard to the violation of rights laid down in the Fundamental Law, if the person concerned is unable to defend his or her rights personally or if the violation of rights affects a larger group of people."

189 Mark Tushnet: Az állami cselekvés tana és az alkotmányos jogok horizontális hatása. [Theory of state activities and the horizontal effect of constitutional laws.] *Fundamentum.* 2/2004. pp. 5-18.

190 Csink – Fröhlich (2012a) p. 100.

191 „A law – even if it gets through the primary filter as being in compliance with the Constitution – may prove to be unconstitutional subsequently, due to mistakes emerging in the application of the law or due to the lack of regulation for certain situations which emerge newly and would require regulation." Csink – Fröhlich (2012a) p. 101.

the parliamentary commissioner of fundamental rights; the other one is b) a version of constitutional complaint, which allows for submitting a petition not (only) against a decision made by a public authority, but also against the underlying norm; the norm may be annulled similarly. This – after defining the person having the right of initiative and the conditions of admissibility – may fill the role of norm control based on involvement (used in individual cases).[192]

In connection with the forming practice of the parliamentary commissioner of fundamental rights Péter Paczolay noted that the parliamentary commissioner's petitioner rights are key issues of the new regulation: the parliamentary commissioner of fundamental rights has submitted twenty petitions for the declaration of subsequent unconstitutionality till July 2012. He turned to the Constitutional Court due to the act on families, on student contracts, the act on minorities, the act on the right to vote and the act on the Constitutional Court. „All in all, conditions are given for the Constitutional Court to exclude the unconstitutional laws from the legal system" – stated the President of the Constitutional Court in an interview.

The other important issue – which has been analysed often in domestic legal and political scientific literature – is the introduction,[193]

192 Csink – Fröhlich (2012a) p. 101.

193 The Parliament on its session on 16 November 2010 approved the Act CXIX of 2010 on the modification of Act XX of 1949 on the Constitution of the Republic of Hungary, with which it modified Article 32/A of the Constitution about the Constitutional Court. Article 32/A paragraph (2) and (3) valid from 20 November 2010 read s follows: „The Constitutional Court shall have powers to review laws on the central budget, the implementation of the central budget, central tax revenues, duties and contributions, customs duties, and on the central government conditions for local taxes, if the grounds cited in the petition for the alleged breach of the Constitution is limited to any violation of the inherent rights of life and human dignity, the right to the protection of personal data, the right to freedom of thought, freedom of conscience and the freedom of religion, or the rights granted under Article 69 in connection with Hungarian citizenship, and it mentions no other reasons. The Constitutional Court shall annul any laws and other statutes that it declares unconstitutional. The Constitutional Court shall have powers to annul laws on the central budget, the implementation of the central budget, central tax revenues, duties and contributions, customs duties,

and survival in the Fundamental Law of the prohibition regarding public funds. Referring to the modification László Sólyom, first president of the Constitutional Court wrote that „questioning the necessity of a rule of law control may bring serious threat to the rule of law itself"[194]. Therefore it may happen, for example, that an act, let it be an act on taxation, is unconstitutional (is against the Fundamental Law), but the Constitutional Court has no procedural competence to examine this, to declare the unconstitutionality of the act or to annul it (except for petitions referring to the inherent rights of life and human dignity, the right to the protection of personal data, the right to freedom of thought, freedom of conscience and the freedom of religion, or the rights granted in connection with Hungarian citizenship).[195]

Another important issue regarding the practical operation of the Constitutional Court is the often analysed political division of the Hungarian Constitutional Court. In relation with this the president of the body said the following: „Regarding the issue of judicial pension the Constitutional Court was more divided than ever,[196] and by now the obvious intention characterising my first two years, according to which in big cases decision shall be made with consensus, cannot be maintained any more".

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and on the central government conditions for local taxes, if the grounds cited in the petition ofr the alleged breach of the Constitution is limited to any violation of the inherent rights of life and human dignity, the right to the protection of personal data, the right to freedom of thought, freedom of conscience and the freedom of religion, or the rights granted under Article 69 in connection with Hungarian citizenship"

194 Sólyom László: Ezen a lejtőn nehéz megállni! [It is difficult to stop on this slope!] *Iustum Aequum Salutare*, 4/2010. p. 6.

195 Tóth J., Zoltán: Az alkotmánybírósági egyéni alapjogvédelem eszközei és gyakorlata – egykor és ma. [The tools and practice of the protection of individual fundamental rights in the practice of the Constitutional Court – now and then.] In: Rixer, Ádám (szerk.): *Állam és közösség. Válogatott közjogi tanulmányok Magyarország Alaptörvénye tiszteletére.* Lőrincz Lajos Közjogi Kutatóműhely – KRE ÁJK, Budapest, 2012. p. 362.

196 From the 14 voting constitutional judges 7 (!) attached separate opinion to the decision, at the voting of 7:7 the vote of the president proved to be decisive.

V. The Fundamental Law and the cardinal acts

1. Reasons for establishing the Fundamental Law

The reason for creating this subsection – moreover, the whole paper – was the tremendous number of questions and impetuous debates which surrounded the establishment of this instrument abroad and within the borders.[197] During the examination of the Hungarian constitution and the Hungarian legal system in general several "sharp" preliminary questions shall be answered, such as why it was necessary to create a new fundamental law more than two decades after the fall of the iron curtain, less than one decade after joining the European Union, in possession of a constitution which fully complied with international requirements.

The subject's literature is rich in different statements: there are some who view the new constitution as result of some symbolic efforts, which would not have been necessary at all, as the post-1989 versions of the previous constitution – while keeping the original numbering of the act – established a fully democratic state governed by the rule of law in every sense, which proved to be operable also in practice. Some express their concerns about the euro-conformity of the Fundamental Law due to its unspecified (legal) notions and the limitation of certain institution (e.g. the narrowing down of the Constitutional Court's competences). Moreover, some stress that the Hungarian Fundamental Law not only

197 The evaluation regarding the partly new problem raising, value system, priorities, moreover, circumstances of creation of the new Hungarian Fundamental Law (and through this the complete legal system) would be full scope only if it was supplemented with a comprehensive analysis mirroring international trends, through which expectations regarding the new fundamental law "would be put into place". The size of the latter task, however, exceeds the frameworks of this work, as well as the possibilities of its author. In this topic – in Hungarian language – see e.g.: Jakab, András – Körösényi, András (editor.): *Alkotmányozás Magyarországon és máshol. Politikatudományi és alkotmányjogi megközelítések. (Constitution-making in Hungary and elsewhere. Political science and constitutional law approaches)* MTA TK Political Science Institute – Új Mandátum Kiadó, Budapest, 2012. p. 309.

meets the basic values of the European Union, but it goes further: it specifies, confirms and explains its basic values in a creative way. Among others with the method that originating from the requirement of human dignity it views the world in the correlation of family and public interest, and it establishes a definitely European, but still original and model construction which rewrites balances.

In order to answer the above assumption – but at least to shed light on the background legislative goals – it is useful to read one of the most authentic sources, the opinion of the prime minister of the Hungarian government after 2010, who explained the practical role of the new Fundamental Law as follows: „The events of 2006[198] made it clear for Hungarians that our constitution – together with all of its modifications – is a constitution of failures, which cannot protect us from anything. It was not able to protect us from total indebtness, from political lies, abuses of power, from police brutality, from the complete destruction of economy, from speculation […] In 2006 the Hungarians realised that Hungary was unprotected and that the basic reason for this is the powerless transitional constitution. […] They came to understand that the renewal of Hungary required a new fundamental law, which provides proper protection to Hungary and to Hungarians, and gives modern answers to the challenges of the 21st century. […] We missed our self-esteem [before]. Our national self-esteem. We missed to proudly tell everyone who we are, how we are connected, what we want; where we came from and where we are going, what we believe is good and what we consider bad."[199]

198 The speech of Ferenc Gyurcsány, who established government after the elections of 2006, held in front of his peers "was leaked" in the late summer of 2006. In the speech the Prime Minister admitted that they had continuously "lied" for victory at the elections. After the release of the speech the greatest turbulences of Hungarian history from the times of the 1956 revolution took place, among others on 23 October 2006, on the 50th anniversary of the Hungarian revolution and freedom fight.

199 Orbán, Viktor: Az újjászületés dokumentuma. (Document of revival) *Magyar Nemzet*, 25 April 2011. p. 6.

2. The Fundamental Law and legal continuity

In addition to the necessity of making a new constitution it is worth examining in advance what the relationship of the new document is to the old one, and to other instruments of Hungarian legal history.

It may be stated in advance that approximately one-third of the new Fundamental Law's provisions fully complies with the text of the previous Constitution's text, another one-third shows great similarity, material correspondence regarding the essence of the regulation, and „only" one-third of the fundamental act may be considered brand new, therewith it introduces new legal institutions and fills old ones with new content.

It is also worth mentioning in advance that the catalogue of rights starts with some general rules which comply with the main requirements formulated during the two decade practice of the Constitutional Court (e.g. principle of necessity and proportionality, material content of fundamental right…) and the list of given rights and their material description is also not "surprising".

The Parliament approved the Fundamental Law on the 25th of April 2011, based on Article 19 paragraph (3) point a) and Article 24 paragraph (3) of act XX of 1949.[200] These provisions establish continuity – which shall be further explained, naturally – between the Constitution and the Fundamental Law, together with the fact that the version of the Constitution established after 1989 considered itself transitional. Moreover, Article 5 of The Transitional Provisions to Hungary's Fundamental Law states that *"The coming into force of the Fundamental Law shall not affect the effect of legislation, normative decisions or orders, or other legal instruments of state administration, concrete decisions or commitments of international law which were adopted, issued, made or undertaken before the Fundamental Law came into force."*

Therefore, as its legitimate basis the Fundamental Law refers (also) to act XX of 1949, not to its Stalinist version, of course. This consequence

200 Fundamental Law of Hungary, Closing Provisions, point 2. Relevant provisions of the Constitution: "Article 19 (3) a) Within this sphere of authority, the Parliament shall adopt the Constitution of the Republic of Hungary."; "Article 24 (3) A majority of two-thirds of the votes of the Members of Parliament is required to amend the Constitution and for certain decisions specified therein."

may be drawn from the comparison of two provisions: the „reconciliation" of the National Avowal's – serving as preface of the Fundamental Law – „We do not recognise the communist constitution of 1949 […][201] statement with Section 2 of the Closing provisions [„Parliament shall adopt the Fundamental Law pursuant to Sections 19(3)a) and 24 (3) of Act XX of 1949"] may be possible only in one way.

This primary picture is supplemented with further provisions of the Fundamental Law; So far as the declared goal of the Fundamental Law – in addition to the delegitimization of a given period of the past – is to restore legal continuity with the pre-1949 (legal) situation. The goal of the Fundamental Law is – among others – to open up towards the past, to facilitate the resuscitation of the so-called historical constitution. The National Avowal – partly for achieving the above mentioned goals – presents (also) the Holy Crown as embodiment of state continuity, and describes the period between 19 March 1944 and 2 May 1990 as the interruption of continuity, stating that Hungary's autonomy was missing in this period.

A specific line of the new legal concept is the aspect with which it views the partial (legal) continuity (!) between the period between 2 May 1990 and 25 April 2011 (1 January 2012) and the (legal) system of the previous Communist dictatorship: according to point 5 of the preamble of Hungary's Fundamental Law's Transitional Provisions „*At the time it was not possible to prosecute the crimes committed under the communist dictatorship and aiming at the building and maintenance of the regime, and, in the absence of a constitutional turning point which could have interrupted legal continuity, no possibility to prosecute these crimes opened up even after the first free elections."* Therefore one of the most important practical (legal) aspects of the topic of legal continuity and facing the past is the problem of limitation, the partial settlement of the which is attempted by the latter document[202] (see sub-section 3.5).

201 *"We do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; therefore we proclaim it to be invalid."*

202 About limitation see in details: Varga, Csaba: Elévülés? Visszaható törvényhozás? Csapdahelyzet és jogtechnikai semlegesség a jogban. [Limitation? Law-making with retroactive force?] Trap and legal technique neutrality in law. *Iustum Aequum Salutare*

The historical constitution is mentioned several times in the Fundamental Law. According to the first sentence of the third paragraph of the National Avowal „*We honour the achievements of our historical constitution"*; according to Article R) paragraph (3) of the Foundation „*The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal and the achievements of our historical constitution."* The National Avowal takes it for granted that there has been and there is today a legal framework – for eternal time – originating from Saint Stephen (1000-1038) and lasting till 1944, and the validity of which – as it has been mentioned – was „suspended" only temporarily, from 19 March 1944 till 2 May 1990.[203]

The concept of legal continuity which looms also in the new fundamental law[204] has several antecedents in Hungarian legal literature and public thinking. In the past the issue of legal continuity was present in legal public thinking in somewhat different context and with different content than today; so far as its forms of appearance were mainly repeated king crowning formulas, oath texts [205] and crowning letters (diploma inaugurale) about the keeping of the laws and costumes, freedoms, exemptions and privileges of Hungary. Today the main – and regarding legal certainty almost only – question is obviously whether despite foreign legal systems existing often for more generations it is possible to return, even if partially, to legal institutions, legal practices, social values appearing as legal values abandoned before – even in under force, – especially that there was also a „pause in the film" after 1948 in those social sciences which are supposed to present these.[206] The

1/2012. pp. 103-115. [hereinafter referred to as Varga (2012)]

203 Apor, Péter: A történeti alkotmány. (The histroical constitution) o. n. http://www.szuveren.hu/jog/a-torteneti-alkotmany (1 February 2012)

204 The declared goal of the Fundamental Law is to restore legal continuity with the pre-1949 (legal) situation. The aim of the Fundamental Law is to „open to the past" and facilitate the „revival" of the historical constitution.

205 About the crowning of the last king see e.g.: Stephan Baier – Eva Demmerle: *Habsburg Ottó élete. [Life of Otto Habsburg]* Európa Könyvkiadó, Budapest 2003. pp. 31-32.

206 Despite its radical nature it is typical that the fact of the approval of the new Constitution of 1949 was not indicated in the thick book of Hungarian

answers of the older legal literature – despite the acknowledgement of real difficulties – are *basically* positive; let us review some of these in the following!

„Faithfulness to the constitution proves the continuity of the constitution, i.e. legal continuity. This means that the constitution may be modified only through legal, thus constitutional methods. Therefore everyone shall stand upon the basis of the present constitution until its modification through a legally recognised way was performed. The use of revolutionary means is as well dangerous as coup-like attempts. Such actions may only hamper the execution of the constitution, but shall not terminate its validity. First, legal continuity shall be re-established and legal development shall be continued from where it terminated some time ago. In 1867 it was managed to put down the foundations of 1848 despite the long term resistance of the emperor" – writes István Egyed.[207] Nowadays Norbert Varga shares this opinion: „With the realisation of the compromise following the neo-absolutism legal certainty was restored, which meant the survival of our historical constitution. This continuity was realised – in addition to the restoration of the old legal order – in the restoration of legal institutions (right to vote at popular elections, ministers' responsibility, etc.)"[208]

When Egyed puts it in a way that „Revolutionary times, the eras when states shake are seedbeds of establishing constitutions",[209] we can also add that among the possible goals of changes there may be – *naturally* – the restoration of legal certainty.

The shared approach of viewpoints originating from before and during the Second World War is that – the mainly external – forced

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Historical Chronology – From prehistory to 1970. (*Magyar Történeti Kronológia – az őstörténettől 1970-ig. [Hungarian Historical Chronology – From prehistory to 1970.]* 5th edition. Tankönyvkiadó, Budapest, 1971. p. 588.)

207 Egyed, István: *Az ezeréves magyar alkotmány. [The thousand years old Hungarian constitution.]* Légrády Testvérek, Budapest 1941. pp. 249-250.

208 Varga, Norbert: Ideiglenesség és jogfolytonosság. Történeti jogintézmények szerepe a magyar alkotmányozásban. [Transition and legal continuity. The role of historical legal institutions in Hungarian constitution-making.] *DIEIP* 2/2011. 4. [www.dieip.hu; 16 May 2011] [hereinafter referred to as Varga (2011)].

209 Egyed op. cit. p. 246.

changes do not affect the basis of the legal system, and as these are of moral aspect, they may be reproduced and restored any time: "The Hungarian state has gone through many convulsions. […] Today it is torn, is unprotected; but it has not lost its faith in its future and is imbued by some mystical force, unswerving belief. […] State may be made by force, but only temporarily. […] The value of our statehood comes from the fact that […] the individuals are connected not only by artificial legal bonds, but also by moral ties; everything holds us together which may make a mass a nations, which may transform the area of the state into a homeland" – we may read.[210] Similarly „[When] after the great difficulties of the long years of the war the spirit of constitution making was raving throughout Europe and new constitution were prepared in a row not only in defeated, but also in neutral, moreover, in victorious countries, the tiny, torn Hungary – even in times of difficulties which seemed to be undefeatable – defined the way of public law reorganisation in the return to old constitutionalism."[211]

The opinion of Gyula Moór is somewhat more tinged, as he does not only mention the issue of returning to the old, but he extends the possibility of legal certainty to certain legal relationships established by the „usurper power", based on practical reasons: „Those who denied the possibilities of establishing revolutionary law would confront the lessons of world history, which prove that from the violation of law (conquest, usurpation, revolution or coup) often new law was established. The legislative power of revolutionary facts is acknowledged by the legitimist approach in the form the *postliminium* institution of public law, which means that the usurper power may establish legal relationships which will be approved by the returning legitimate power, as it has no other choice. (For example Article 9 of Act I of 1920 in Hungary)."[212] It is not enough, therefore, to draw attention to the fact that „[the]two break-ups with legal continuity which intended to be final in 1919 and in 1943

210 Egyed op. cit. p. 245.

211 Egyed op. cit. p. 248.

212 Moór, Gyula: *A jogbölcselet problémái. (Problems of legal philosophy.)* Magyar Szemle Társaság, Budapest 1945. p. 25.

were both illegitimate, they were forced by Bolshevik dictatorships"[213], but in each such case – in a supplementary way – we shall also give account about how those legal relationships may be settled which were influenced by the authorities in the given periods, and the acceptance of the further validity and enforceability of certain laws shall also be reasoned (e.g. the requirement of legal certainty). „But simply based on theoretical considerations we shall arrive to the same conclusion – Gyula Moór continues his train of thought – as if we denied the possibility of revolutionary law, we would state that law may be established only in legitimate way, i.e. always in compliance with itemized law. This means that older law, which facilitated the establishment of a newer law had to be established also upon the provisions of an even older law. The retrospection cannot go on *ad infinitum*. We shall finally indicate a first law which could not be established upon the provisions of an even older law – because there was no such law before – but it came into being upon its own force. This is the same as revolutionary law, as this is also established as law depending on its own force."[214]

During any attempt to interpret the relationship between the Fundamental Law and the historical constitution the separate examination of legal continuity receives special attention also in the newest legal literature:[215] „A precondition of historical constitution, however, – partly as a type of constitutions, and also as the historical constitution embodied in the Hungarian Holy Crown theory – is traceable organic development, legal continuity. The notion of legal continuity is inseparably related to the constitutional development of customary law; historical constitution may exist only where constitutional continuity is unbroken. Without this counter-related legal development cannot be interpreted, thus the notion of historical constitution shall not lack the temporal succession of written and unwritten law, and the compliance with the legal system

213 Paczolay (2011)

214 Moór op. cit. p. 25.

215 Csink Lóránt – Fröhlich Johanna: Történeti alkotmány és kontinuitás az új Alaptörvényben. [Historical constitution and continuity in the new Fundamental Law.] *Közjogi Szemle* 1/2012. pp. 5-6. [hereinafter referred to as Csink – Fröhlich (2012b)].

serving as background for the before mentioned. *Formal legal continuity*, therefore means that the constitution may be modified only by those with proper authorisation, in a legal way defined in the constitution, regardless of the content of the changes. On the contrary, *material legal continuity* imposes a further requirement in additions to the conditions of formal legal continuity, namely that the reform shall originate from existing institutions, constitutional structures, the development course of the constitution, which can ensure organic development.[216]

Regarding legal continuity looming in relation with the Fundamental Law it may be also examined whether such formal and material legal continuity may exist in connection with the historical constitution and with cardinal acts, but it is an unavoidable fact that in parallel with the annulment of Act XX of 1949 – in the opinion of Péter Paczolay, President of the Constitutional Court – the cardinal acts were not and could not be restored with their original content, and other legal tools of the present were not renewed upon old requirements.[217] (For the practical significance of the notion of historical constitution see section V.3.2)

3. Certain important features and functions of the Fundamental Law

3.1. The Fundamental Law as basic norm and a tool of legitimization

The establishment of the Fundamental Law on the short run and partially unconditionally extends the area of movement of the establishing

216 Formal and material legal continuity was defined this way upon Tóth József Zoltán by Csink – Fröhlich (2012b) p. 6 The authors supplement their statement with the following: "We do not consider as part of this notion the public law continuity falling beyond legal continuity, which in this sense means, regardless of any attempts which may be interpreted as the interruption of continuity, the continuous development of public law culture. With this regard we may mention the return to the acts of 1848 or to act I of 1946 at the time of the change in the system, even though public law continuity did not exist." (Ibid.)

217 Paczolay, Péter: A történeti alkotmány és a konzervatív jogi gondolkodás. (Historical constitution and conservative legal thinking.) In: *Magyar konzervativizmus – Hagyomány és jelenkor. (Hungarian conservativism – Tradition and the present.)* Batthyány Lajos Alapítvány, Budapest 1994. p. 34. [hereinafter referred to as Paczolay (1994)]

political force(s), therewith the values and institutions contained therein definitely comply with the actual, main directions of social control, of its political and other intentions. Moreover – especially because of the atypical nature of two-third majority necessary for the modification of the Fundamental Law – the Fundamental Law made under exceptional historical and political "synods" may be able – in a neutral sense – to "capture" the future, again establishing a framework in Hungarian legal development which may remain unchanged for decades.

In positive law sense the constitution is the basic norm of the legal system and at the same time it is part of the legal system.[218] It is disputed, however, how much these facts make the fundamental norm the basis of the system of social norms, and how much these make it a part of it at all. From this aspect it is what its maker wants the Fundamental Law to be viewed; at what way and at what degree it wishes to make the Fundamental Law the part and basis of social norms. Viewing this issue from the aspect of our specific topic it is obvious that the new constitution may lead to *focusing on the conservative legal approach*.[219] In the perception of conservative legal approach – among others – law is subjected to moral principles or at least some kind of higher principles, law and moral cannot be divided as sharply as stated by legal positivism; furthermore, the role of legal development by judges is very important.[220]

If we accept the possible division of political and legal constitutional development it may be stated that the advantage of „legal" constitutional approach may be relative accuracy and interpretation security, while its disadvantage is the is the danger that state goals and value preferences are missing.[221] However, – as it has been referred to before – the new Hungarian political regime and the Fundamental Law itself – contrary to the primacy of rules – declares the primacy of principles and values.

218 Szigeti (2011) p. 55.

219 Paczolay (2011) op. sic.

220 The phrase conservativism has significant role with regard to the examined processes and phenomenons, but its explaining force is limited. For this see Balázs, Zoltán: Menczer Béla gondolkodásának helye a magyar konzervativizmus hagyományában. [Place of Béla Menczer's theories in the traditions of Hungarian conservativism.] *Politikatudományi Szemle* 1/2010. pp. 94-95.

221 Szigeti (2011) p. 55.

Uncertainty may be significant regarding the appearance of these – partially – new principles in itemized law because without legal (constitutional court, ordinary court) practice the real content, scope, direct referability (!), etc. of these provisions is strongly doubted.

Within the evaluation of the legitimization of Hungary's Fundamental Law – according to András Jakab – the clarification of preliminary questions regarding the function of the constitution are necessary (therewith that if any constitution meets these requirements, út may be considered legitimate, worth to be followed): „We usually expect three things from modern constitutions: (1) they shall embody the self-control of power (this is declared in the protection of fundamental rights and the basic theory of the division of powers), (2) the most important basic institutions of the state structure shall be established (constituted) democratically, and (3) they hall be symbols which keep the society together.[222] This latter one is closely related to the notions and procedures of institutionalisation and legitimization, which is the transformation of behaviour into habitual and typical in social roles, while legitimization problem occurs when experiences abstracted in the languages are transferred to the next generation. The legitimization procedure explains and certifies institutionalised processes for those who – as they did not take part in the establishment of these procedures – do not consider institutionalisations natural.[223] As soon as certain rules become obvious, i.e. they institutionalise as public agreements, the procedure starts immediately, within which the relationship between the rule (social and individual expectation) and its direct moral reasons starts to get more and more fragmented and ambiguous. This may indicate the

222 Jakab, András: Mire jó egy alkotmány? Avagy az újonnan elkészülő alkotmány legitimitásának kérdése. (What is a constitution good for? The question of legitimacy of the newly established constitution.) In: Jakab, András: *Az új Alaptörvény keletkezése és gyakorlati következményei.* (The establishment of the Fundamental Law and its practical consequences) HVG-ORAC, Budapest, 2011. p. 131. [hereinafter referred to as Jakab (2011)]

223 Karácsony, András. Konstruktivizmus a társadalomelméletben. (Constructivism in the theory of social science) In: *A társadalom és a jog autopoietikus felépítése. (The autopoiethical structure of society and law.)* (editors Cs. Kiss, Lajos – Karácsony, András) Budapest 1994. p. 14.

significance of the Fundamental Law and in its context of the historical constitution, therewith the (given) notion and its content outlines, fixes and regulates the methods of transfer of social experiences. In order to prevent this information from becoming fragmented and ambiguous – regarding its content and ways of access – the most obvious tool is existence of a constantly "updated" and enforced social value catalogue.

3.2. Certain features of the concept of the historical constitution

Another question which is difficult to separate from the above mentioned issue of legal continuity is the approach of the Fundamental Law regarding to historical constitution, which is worth considering in order to indicate the practical significance of the thrive of this legal approach.

The Fundamental Law describes itself as a fundamental law restoring the nation's historical constitution. Even though this "historical constitution" is one of the main legal sources of the new structure, its meaning is barely mentioned in the preamble.[224] Legal historical experience shows that in the existence and *reappearance* of traditional law – even in the newest era – there is a phenomenon that countries becoming independent or separating in any way sooner or later include into their ideological-political reasons the intent of relativisation of traditional law.[225] In Hungary the emphatic appearance of historical constitution in the (new) Fundamental Law – also becoming an element of interpreting itemized law – may be evaluated as similar development.

It is supplementary information to this question that the historical feature of the constitution has never meant pertification; historical constitution is also changing. „This change, however, it not forcible interruption and an introduction of a new system, but [organic] development, further building, the [continuous] inclusion of necessary reforms into the constitution."[226]

224 Apor op. cit.
225 Kulcsár Kálmán: Jogszociológia. (Legal sociology.) Kulturtrade Kiadó, Budapest, 1997. p. 129. [hereinafter referred to as Kulcsár (1997)]
226 Egyed op. cit. p. 248.

The sources for getting to know the old Hungarian law, thus the „one thousand years old" Hungarian constitution, the historical constitution are – mainly – *customary law, law and privilege*. The *leges cardinale* (cardinal acts) meant the core notions of the historical constitution, which *theoretically* consist of cardinal acts which may be listed one by one, as it has been tried by many.[227] „The consequence of the historical constitution is that Hungarian constitutional theory used the material notion of constitution (interpreting it as special organisation of society). In Hungarian history the constitution in material sense – the basic values of state – was regulated by the so-called "cardinal" acts."[228] It is an important supplement that the cardinal feature and fundamental feature of laws were established by customary law. [229]

We may state that the difference between written and historical constitutions may be apprehended mainly through differing ways of thinking: while for written constitution itemized (positive) law is the primary source, historical constitution originates mainly from constitutional conventions.[230] From the aspect of the present Fundamental Law an important „[question] therefore is whether 'genre differences' between written and historical constitution may be superable; whether the achievements of the historical constitution may provide help in the interpretation of a system which is basically of different logic (written constitution). We shall examine therefore whether there is an 'achievement' which may be useful for the interpretation of the Fundamental Law."[231] The expression of achievement – in the Fundamental Law[232] – itself

227 E.g. Csizmadia, Andor: Hajnóczy József közjogi-politikai munkái. [Public law-political works of József Hajnóczy.] Akadémiai Kiadó, Budapest 1958. pp. 236-240.

228 Paczolay (2011) op. cit.

229 The earlier legislation also used the terminology of fundamental law: the title of act III of 1827 was maintaining the validity of fundamental laws.

230 Vö. Jakab, András: Mire jó egy alkotmány (What is a constitution good for?) *Kommentár (Commentary)* 6/2010. p. 13. [hereinafter referred to as Jakab (2010)]

231 Csink – Fröhlich (2012b) p. 4.

232 It is stated in the National Avowal that "We honour the achievements of our historical constitution and we honour the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation", and

probably refers to the fact that not necessarily concrete – contemporary – texts return to legal life, but background principles may be settled, returned, strengthened, provided that these principles are defined in a properly clarified way, which may be presented also in the present social-legal context. Zoltán Szente states that the theory of the Holy Crown and the Fundamental Law are concepts which cannot or can hardly be harmonised with each other, and he arrives to the conclusion that within the framework of the Fundamental Law the resolution of the before mentioned conflict may only happen by disregarding the achievements of the Fundamental Law and the declarations related to the theory of the Holy Crown[233]. In reality one possible approach of the historical constitution is which – at most – attributes symbolic importance to the notion and phenomenon of historical constitution, stating that the relevant parts of the National Avowal and Article R paragraph (3) wish to facilitate and strengthen respect for the achievements of the historical constitution. „Such constitutional provisions are obviously self-generating norms, the designation of which is to realise the social cohesion strengthening effect attributed to the Holy Crown and to the historical constitution."[234] Truly, the category of historical constitution – as separate type of norms – may be hardly inserted into the hierarchy of norms, primarily due to its ambiguous content.

The most common mistake in relation with the historical constitution – however – is that we only consider as important issue the notion of the historical constitution, its "itemized" content; however, in parallel with this we could ask the question why it is useful, what it can be used for: i.e. whether through the historical constitution we can get closer to the solution of the present problems. And from this approach there are great opportunities lying in the historical constitution: István Egyed

Article R) paragraph (3) according to which „The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal and the achievements of our historical constitution."

233 Szente, Zoltán: A historizáló alkotmányozás problémái – a történeti alkotmány és a Szent Korona az új Alaptörvényben. (Problems of historical constitution making – the historical constitution and the Holy Crown in the new Fundamental Law.) *Közjogi Szemle* 3/2011. pp. 1-13. [hereinafter referred to as Szente (2011)]

234 Csink – Fröhlich (2012a) p. 98.

said the following: „[Each] historical constitution has its immeasurable advantage that it really mirrors the public opinion of the nation. We did not receive our constitution, we did not copy it, it was not made at all; it grew out from the national soul as result of natural development as the greatest work of national culture. Such historical constitution may be best described as the nation's own way of being; it perfectly suits the characteristics, spiritual state of the nation. Such constitution, therefore, is the carrier of great traditions and at the same time it is the way of future development."[235] The real force of the historical constitution, therefore, shall be searched for in common understanding, i.e. in common understandings regarding important principles[236], in those ones which may be worked out under given circumstances without the direct political defeat of any of the parties. At the same time, however, maybe this is the most significant obstacle preventing the historical constitution from becoming an organic part of living law, as a living historical constitution – even if only as a method (!) of interpreting law – can only exist if the relationship to the past is clarified, settled and definitely majority. As in the wider social-political environment one of the main and constant difficulties is the lack of common and valid tradition which may serve as basis for material discussions, every institutionalised way trying to establish it may be „desired solution".

Phrasing it in a rather biased way: today the question is not (only) whether it is necessary to have a historical constitutions, but (also) in what way we should start the rebuilding of the common past which serves as a foundation of the present and which is still searching for its contours, and thus upon this basis where we can define the place of the historical constitution in this common legal and everyday history. One of the greatest weaknesses of Hungarian politics and social (public) life is – traditionally – the separation, opposition of its elite along expressly political aspects and breaking lines (and this has significant consequences in several fields of social life). Therefore we shall not treat historical constitution as temporal problem of (legal)dogmatic (e.g. the question of fitting it into the hierarchy of laws), but we may

235 Egyed op. cit. p. 247.

236 Thought of Barna Mezey (expressed: at the round table discussion 'The relationship between the Fundamental Law and the historical constitution', on 29 February 2012 at the Faculty of Law of Eötvös Loránd University).

view it as a living framework, an objective way of being, which may be suitable to establish basic compromises without obvious forces and self-abdication in fields which lack these nowadays. The clarified historical constitution, as specific objectivation, as specific institution may facilitate, for example, the development of political etiquette, the expansion or reduction of the number of topics which may be discussed in public, and eventually may lead to the establishment of new social common agreements. It could be a new political framework, which could provide for the common acceptance of common values without – obvious political – defeats and unnecessary losses, due to its novelty and freshness.

Nevertheless, in the establishment of the "body" of the historical constitution legal science shall have a determinative role, as well as the Constitutional Court and the courts; law in this regard – as a tool of social engineering – may shape the society's and the nation's way of thinking, approaches and biases (in certain ways influencing also governmental capacities…).

Therefore two opinions may be outlined about the meaning of historical constitution introduced in the Fundamental Law of Hungary:

I. *A limited concept – historical constitution as legal culture*

For the representative of this approach the historical constitution is much more a catalogue of legal (public law) culture than that of legal sources and independent legal (political) solutions. From the most cited authors András Jakab refuses to give more space to historical constitution in the context of the new Fundamental Law than a „reasoning decorating role".[237] As it has been mentioned before, Péter Paczolay is at the same opinion: „The Hungarian historical constitution – despite all theoretical attempts made to justify it – was a constitution with significantly reduced force, the instalment of which was eventually destroyed by the storms of the 20th century. However, some parts of the old Hungarian constitution, mainly the symbolic ones, may be preserved. Today legal continuity is maintained mainly in symbolic elements, such as the coat of arms and the Himnusz (Hymn)."[238] In summary: for the representatives of this approach the historical constitution is much more a catalogue of legal

237 Jakab (2011) p. 199.
238 Paczolay (2011)

(public law) culture[239], than that of legal sources and independent legal (political) solutions.

This „way of use" regarding the historical constitution may be also described as the renewal of the *red tail concept*[240], which focuses more on historical, comparative approaches during the legal interpretation activities of the Constitutional Court and other courts, with well selected historical examples and reasons trying to find further confirmation to its opinion established regardless of the mentioned institutions. Among the virtues of this concept it shall be mentioned that during the examination of given legal institutions it broadens the time horizon, and quasi forces the interpreter of law, the legal practitioner to expand the need for the clarification of notions to historical questions and aspects which it earlier mentioned only with one sentence or a reference. This may also be the danger of the concept: sematic and forced use of law might not increase respect for historical achievements, on the contrary: the unlimited nature of references may have alienating effects on legal practitioners, while during the shaping of general legal beliefs it may have effects which result in false, unreal expectations and ideas.

II. *A radical concept – the historical constitution as a way for itemized law extension and the direction of making political public agreements*

A „domesticated" form of this concept is the idea which would try to create an expandable „achievement-catalogue" – composed of individual institutions incorporated again into valid, positive law – partly in order to vest the interpreted notion with material meaning by „taking the Fundamental Law seriously", and partly in order to prevent the establishment of domestic scientific schools speaking in parallel with the use of unspecified, discursive and undefined legal categories. This

239 Thought of Elemér Balogh (expressed: At the round table discussion 'The relationship between the Fundamental Law and the historical constitution', on 29 February 2012 at the Faculty of Law of Eötvös Loránd University).

240 A stylistic approach common during the state Socialism, which placed a summarising thought – which ideologically suited the official expectations of the time – to the end of linguistically formulated works (articles, studies, novels, film, etc.), sometimes expressly conflicting the actual meaning of the work.

opinion identifies the institutionalised way of connecting with the past with the establishment a more careful, partial material legal continuity. This approach, therefore, may be called the concept of partial material legal continuity. This approach, however, also states that the – already started (see section IV.) – „resuscitation" of individual historical legal institutions „may be possible only by taking into account the constitutional requirements of the past period"[241], thus it considers it necessary to create some kind of a *test* also in this area.

In this approach – as it has been mentioned – it is also important – in given cases – that reasons looming from the past may be not only interesting, but not independent supplements, but at the same time also elements – inseparable from legal practice, but going beyond it – which are able to shape the present's public opinion and common agreements.

The intention of the legislator to re-introduce the historical constitution into the Hungarian legal environment as material legal institution may be shown by the fact that not only the Avowal refers to its significance, but also paragraph (3) of Article R) transforms its application as an explicit requirement: its presence in the Fundamental Law, therefore, is not limited to the declarative elements, but also as a legalising item, as a significant tool of interpretation. This is important also because in the newer legal literature there are opinions according to which the political declarations of the preambles are separated from the legally binding norm content and may not [necessarily] provide obligatory guidelines for interpretation.[242]

Article 28 of the Fundamental Law refers to the – not clearly defined – use of the historical constitution by legal practitioners: „*In applying laws, courts shall primarily interpret the text of any law in accordance with its goals and the Fundamental Law. The interpretation of the Fundamental Law and other laws shall be based on the assumption that they serve a moral and*

241 E.g. Varga, Norbert (2011) p. 323.

242 A preambulumok egyes szerkezeti elemei és az értelmezési lehetőség közötti összefüggést lásd For the correlation of certain structurel elements of preambles and the possible ways of interpretation see Antal, Attila: „A preambulum ornamentikája és közjogi ereje" ("Ornamentics and public law force of the preamble") In: Antal, Attila – Novák, Zoltán – Szentpéteri Nagy, Richárd (eds.): *Az alkotmány arca. (The face of the constitution.)* Budapest, L'Harmattan 2011. p. 30.

economical purpose corresponding to common sense and the public benefit." Based on the comparison of the cited paragraph of Article R) and Article 28 the only possible consequence is that in their interpretation activities based on the Fundamental Law the courts shall take the achievements of the historical constitution as a starting point.

In connection with this interpretation activity we may state that Article 32/A of the previous Constitution did not reserve the right of interpretation of laws to the Constitutional Court, and from Article 70/K and paragraph (2) of Article 77 it was possible to explain the possibility of judges to apply the Constitution directly, even though ordinary courts usually rejected those claims which were submitted exclusively due to the violation of constitutional rights, requiring other reference to an act or any other piece of law in order to deal with the subject.[243] Without analysing the relevant provisions of the Fundamental Law it may be stated that it is obvious that in sketching the essence and outline of the judicial behaviour „paying attention" to the achievements of the historical constitution the Constitutional Court and the Curia will play an important role.

The frameworks of the above mentioned two concepts (I-II) are strengthened by the polemy which unfolded in Decision IV/2096/2012 of the Constitutional Court. The following may be read in the reasoning of the decision examining the issues of the pension age of judges: "It shall be a minimum requirement to the consolidated interpretation of Hungarian historical constitution to accept the fact that acts constituting the civil transformation in the 19th century form part of the historical constitution. These act established – after not insignificant antecedents – the firm basis of legal institutions on which the modern state under the rule of law is based. Therefore when the Fundamental Law quasi opens a window to the historical dimensions of our public law, it draws attention to those institution historical antecedents, without which our present public law relationships and in general our legal culture would

243 Gárdos-Orosz, Fruzsina: *Az emberi jogok alkalmazásának lehetőségei a rendes bíróságokon, különös tekintettel a magánjogi jogvitákra. (Possible ways of using human rights at ordinary courts, with special attention to private law disputes.)* Theses of doctoral essay. Győr, 2010. pp. 11-12.

be rootless. In this new situation the responsibility of the Constitutional Court is extremely important, one could say it is of historical importance: at the examination of given cases its shall include into its critical horizon the relevant source of legal institution history". In the given case the Constitutional Court acted so, using the provisions of two acts from the 19th century as independent reasons. However, in the examined field Béla Pokol's separate opinion strictly opposes this reviving practice: „Article R) of the Fundamental Law in fact refers to interpretation in light of the achievements of our historical constitution, but its presently undefined nature obliges us to act carefully. The present legal historical citations from these acts mentioned in the reasoning simply mean the detailed rules of an old regulation. Should we treat these as obligatory today and confer normative force upon them contrary to the will and laws of the present legislative majority, then in reality we would question the concept of changeable law. Therefore in my opinion Article R) shall not be used, because it is contrary with the theory of changeable modern law. In addition to this as precedent it may present a bad example, because the petitioner lawyers of the present days submitting constitutional complaints will have dozens of laws at their disposal from the 19th century, which may be referred to against the legal regulations of the present days, as 'achievements of the historical constitution'. Within a short period of time this may create a false-historical reasoning dimension in the flow of constitutional complaints, in which hundreds of trainee lawyers may receive the task of doing research in and prepare the use of various documents of legal history. The final result of this cannot be anything else, but the discrediting of the theory of the historical constitution."

It is an important supplement to the significance of the Fundamental Law that the Fundamental Law cannot be considered as strong instrument of positive law as the previous one, due to its function as "a door to the past and to the future". (See in details in the following subsection.)

3.3. A Fundamental Law open from down, from up and from the side

Now we shall draw attention to the fact that the new Fundamental Law stands in front of us as a constitution open from downwards, from

upwards and from the side. *Openness from downwards* mean that by declaring legal continuity it theoretically opens the possibility to attribute – not yet clearly defined – actual law meanings to some parts of the historical constitution. *Openness from upwards* may be interpreted in a way that under the force of the new Fundamental Law it becomes the responsibility of the state (and its organisations) to proceed during the enactment of any normative or individual act or the interpretation of Hungary's Fundamental Law by paying attention to the interests of future generations.[244] The protection of the interests of future generations requires us to „limit the enforcement of the empirical majority with reference to an actually non-existing population – eventually to a principle valid regardless of the opinion of the actual majority – let it be at political elections or through the market game of demand and supply".[245] For its reliable operation in practice, however, the traditional principles of democratic representation and decision making shall be supplemented[246], therefore new institutionalised solutions are / will be needed.

Openness from the side shall be interpreted in a way that by the Transitional Provisions to the Fundamental Law of Hungary and the cardinal acts the *constitution is practically doubled* and fills the „available space" even more than before, if it is possible.

The constitution which is temporally – i.e. regarding its own time scope – is open from up and down relativises itself: partly the obligation to interpret its provisions upon the historical constitution uniquely – retrospectively – reduces the bonds of the constitution to the given time period, and partly – within the explanation of constitutional values – the constitutional-fundamental law approach focusing on the interests of the future generations makes the actual meaning of the fundamental law's/ constitution's itemized provisions uncertain. This – above explained – openness itself significantly increases the importance of cardinal acts,

244 See e.g. Article P) of Hungary's Fundamental Law: "*All natural resources, especially agricultural land, forests and drinking water supplies, biodiversity – in particular native plant and animal species – and cultural assets shall form part of the nation's common heritage, and the State and every person shall be obliged to protect, sustain and preserve them for future generations.*"

245 Lányi op. cit. p. 118.

246 Ibid.

uniquely reproducing the situation in which the main feature of the historical constitution was that a well-outlined and palpable, though – regarding its principles and rules – not complexly written constitution was – mainly – made of cardinal acts. In this regard the new Fundamental Law – which can be interpreted only together with the cardinal acts related and attached to it – uniquely opens up and at the same time weakens itself, giving more space to the infiltration of ideas not – necessarily – based on legal positivism – both in legislation and in the practice of constitutional adjudication in a strict sense.

3.4. The "novelty" of affected relationships

The speciality of the Fundamental Law and the newer elements of the legal system if that the scope of situations, the characteristics of subject and their balance have been also changed. In this scope there is also a special duality: on the one hand the regulations of virtual spaces may be in focus, and, on the other hand, the more precise, careful and new regulation of essential conditions of life is also important – e.g. through the regulation of right to food or water, which were not considered relevant, central (legal) issues in Hungary earlier for decades.

3.5. How many legal instruments does Hungary's Fundamental Law have?

It is known that there are countries the fundamental law of which is composed of more documents, not just one. Through the new products of legislation the same situation occurred in Hungary, though not without legal difficulties.

The act called the Act on Transitional Provisions of Hungary's Fundamental Law (Aár.) consists of two well separable material parts: 1) it names the criminal act committed during the Socialist dictatorship and their perpetrators (among them the successor party of the Hungarian Social Workers' Party, the Hungarian Socialist Party, existing today as the largest opposition party[247]), at the same time regulating the some legal

247 „4. The Hungarian Socialist Party, having gained legal recognition during the democratic transition, shares all responsibility which lies with the state-party, as the

consequences of the responsibility (e.g. reduction of state benefits for the still living leaders of the dictatorship); 2) contains provisions related to the entering into force of the Fundamental Law (including the so-called Closing provisions), among which there are several provisions which cannot necessarily de derived from the Fundamental Law, and the presence of which in the text conflicts with the statements of the general reasoning, as it may be read there that these provisions [exclusively] „contain formal legal parts which include traditional transitional provisions related to the entering into force of the Fundamental Law". The controversy may be solved through the fact that the obvious aim of the Aár. is – beyond their political declaration – to make provisions constitutional (by hiding them from the examination of the Constitutional Court by raising them up to the fundamental law level) the harmony of which with the Fundamental Law is at least questionable.

The Parliamentary Commissioner of Fundamental Rights expressed a similar opinion,[248] according to which „Regarding their content transitional provisions are rules which are related to issues already regulated in the fundamental law, and to the fundamental law itself, which define temporary differences, exceptions, or one time, specific actions. Their common characteristic is that their approval is made necessary by the transition from the old regulations to the new, their establishment is especially important for ensuring legal certainty in case of significant modifications." The parliamentary commissioner of fundamental rights resents, among others, that several provisions do not make any attempt to define „temporal limits" logically inseparable for transitional regulations,

legal successor of the Hungarian Socialist Workers' Party, heir to the unlawfully accumulated assets and beneficiary of the illegitimate advantages obtained under the dictatorship or during the transition, and by reason of the personal continuity which linked the old and the new party and is still characteristic of the party's leadership."

248 The Parliamentary Commissioner for Fundamental Rights turned to the Constitutional Court on 13 March 2012. In his petition he primarily requested the annulment of the Aár. as a whole, as secondary request the annulment of the phrase in Article 31 paragraph (2) of the Aár. which declares that the Aár. formed part of the Fundamental Law, as well as the annulment of provisions which cannot be considered transitional due to their material content. For the petition see (in Hungarian): http://www.ajbh.hu/allam/jelentes/201202302Ai.rtf

and several provisions actually detail the articles of the fundamental law on the merits, define specific legal institutions, without them being related to the execution of the Fundamental Law, or being transitional in their nature at all (an example to the latter one may be Article 30 of the Aár. on the establishment of a possibly new institutions combining the tasks of the Magyar Nemzeti Bank and the institution supervising the financial intermediary system).[249] By examining the characteristics of provisions included into the Aár. it may stated therefore that these are mainly detailed rules and provisions regulating concrete legal relationships, which lack any general, abstract features otherwise characterising constitutions.[250] The transitional nature of the document is also weakened by the large number of political declarations, which mainly originate from the basic idea stated in the preamble according to which „*Hungary's current rule of law cannot be built on the crimes of the communist regime"*. Several provisions cannot be applied directly, they require further legislation (e.g. for the reduction of Communist leaders' pension). The existence of laws, however, which will have the Aár. as their legitimate basis, would (have) also require(d) the exact definition of the Aár.'s place in the legal system.

It is (was) therefore a determinative question what the relationship between the Transitional Provisions to the Fundamental Law of Hungary and the Fundamental Law was, and thus whether it can be reviewed by the Constitutional Court. A pre-question to the related theoretical examination is what place the Aár. has in the hierarchy of legal source and – from constitutional law aspects – what it role is in the legal system. The *original* text of the Aár. refers to two authorizations; as its legitimate basis is refers both to the Constitution[251] and to the Fundamental Law. According to its Preamble the Parliament enacted the Aár. in the interest of the enforcement of the Fundamental Law.[252] Moreover, section III.

249 Article 2 of the first modification of Hungary's Fundamental Law annulled Article 30 of the Aár..

250 For the theory about abstract notions used in constitutions and in constitutional reasoning see: Cass R. Sunstein: *Legal Reasoning and Political Conflict*. Oxford, University Press 1996. pp. 35-61.

251 The basic reason for this is that the Aár. was enacted by the Parliament on 30 December 2011 (during the validity period of the Constitution).

252 "(…) *in the interest of enforcing the first Fundamental Law of Hungary, adopted*

of the Closing Provisions of the Fundamental Law expressly refers to the Aár.: the „*Parliament shall adopt the temporary provisions related to this Fundamental Law in a special procedure defined in point 2."* The Fundamental Law, therefore, considers the enactment of the Aár. necessary. The fact which could have made the reader of the two legal instruments somewhat confused at the beginning of 2012 was that the Aár. clearly referred to its relationship to the Fundamental Law in paragraph (2) of Article 31, according to which „*The Transitional Provisions shall form part of the Fundamental Law"*, but this was not necessarily clear from the Fundamental Law itself (from the cited point 3 of the Closing Provisions), from the expression „related to".

Several possibilities were raised, therefore: the Aár. a) will be part of the Fundamental Law; b) is a legal source independent from the Fundamental Law, at a fundamental law level, or c) is a legal source, but not at fundamental law level.[253] These options – as it has been mentioned – were not raised as dogmatic, theoretical questions, but also sharply raised the question whether the control of the Constitutional Court exists over this instrument. It may be stated safely that an act like the Aár. may become part of the Fundamental Law in two ways: on the one hand, if the Fundamental Law itself declares that the Aár., established in a separate document forms its part, or, on the other hand, in the case if the approval of the Aár. happened within the procedure aiming at the modification of the Fundamental Law. If it had been so, then – at the time of the first version – the Constitutional Court would have had the right to examine it on the merits. *The significance of the question – and the serious mistake of law making – is shown by the fact that the first modification of the Fundamental Law happened in this case, stating that: "Transitional provisions declared in Article 3 shall form part of the Fundamental Law."*[254]

according to the requirements of the rule of law, hereby proclaim the following (...)"

253 Csink – Fröhlich (2012a) p. 146.

254 Article 1 of the first modification of Hungary's Fundamental Law

4. Main criticism regarding the Fundamental Law

Well-known legal protection organisations formulated several times between 2012 and 2012 the requirement that „(…) the Parliament shall not reduce the present level of protection of fundamental rights, except for justifiable constitutional emergency. If a cardinal act reduces the level of protection in any way, the legislator shall provide detailed reasoning about what kind of threat of which fundamental right or value makes the reduction of protection necessary. (…) We also request that the further planned reorganisation of public institutions regulated in the Constitution – except for the organisation of the Government, naturally – shall mirror a conservative approach, thus the system and character of constitutional institutions may be changed only upon serious and publicly explained reasons. We request the review (…) of the already introduced changes. (…) We also request to keep in mind that the structural reorganisation of the state's organisation shall not result in the reduction of institutional guarantees attached to the protection of law, i.e. the original competences of the Constitutional Court shall be revived (…)".[255] In summary, therefore – with serious simplification – the requirement of reliability, foreseeability and reasonableness lacking actual interests were defined in the before mentioned statement, as well as in other criticisms. (Regarding further external criticism see section VI.5.3).

5. Cardinal acts

Article R) paragraph (1) of the Fundamental Law states that the Fundamental Law shall be the foundation of the legal system of Hungary. Regarding the system of laws and the hierarchy of laws paragraph (1) of Article (T) states: „*A generally binding rule of conduct may be laid down by a piece of legislation which is made by a body with legislative competence as specified in the Fundamental Law and which is published in the Official Gazette. (…)"* and based on paragraph (3) of the same article: „*No legislation shall conflict with*

255 Joint statement "Cardinal request" of the Eötvös Károly Institute and the Hungarian Civil Liberties Union made on 4 July 2011; http://ekint.org/ekint/ekint.news.page?nodeid=465

the Fundamental Law". According to the Fundamental Law legislation shall include Acts of Parliament, government decrees, orders by the Prime Minister, orders by the Governor of the National Bank of Hungary, ministerial decrees, orders by autonomous regulatory bodies and local ordinances. Legislation shall also include orders issued by the National Defence Council and the President of the Republic during any state of national crisis or state of emergency [paragraph (2)].

Article T) paragraph (4) differentiates cardinal acts within the notion of laws: „*Cardinal Acts shall be Acts of Parliament, the adoption and amendment of which requires a two-thirds majority of the votes of Members of Parliament present."*

In Hungary's Fundamental Law 32 cardinal acts are mentioned. *Among cardinal acts initiated or approved after the approval of the Fundamental Law those shall be mentioned every provision of which required 2/3 majority* (Act LXVI of 2011 on the State Audit Office of Hungary, Act CLI of 2011 on the Constitutional Court, Act CCIII of 2011 on the election of the members of the Parliament, Act CCXI of 2011 on the protection of families, Act C of 2011 on the Right to Freedom of Conscience and Religion, and on the Legal Status of Churches, Religious Denominations and Religious Communities, which was abolished by the Constitutional Court due to constitutional invalidity[256], Act CCVI of 2011 on the Right to Freedom of Conscience and Religion, and on the Legal Status of Churches, Religious Denominations and Religious Communities), *as well as those some provisions of which may be approved with simple majority* (Act CXIII of 2011 on the national defence and the Hungarian Defence Forces and specific measures may be implemented in case of special legislation, Act CX of 2011 on the Legal Status and Remuneration of the President of the Republic, Act CLXI of 2011 on the Organisation and Administration of Courts, Act CLXII of 2011 on the Legal Status and Remuneration of Judges, Act CLXIII of 2011 on the Prosecution Service, Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and Other Prosecution Employees and the Prosecution Career, Act CLXXXIX of 2011 on Local Governments of Hungary, Act CCII of 2011 on the Use of the Coat of Arms and Flag of Hungary and on State Awards, Act CLXXIX of 2011 on the Rights of Minorities, Act CXCIV of 2011

256 Decision of the Constitutional Court 164/2011. (XII.20.) ABH

on the economic stability of Hungary, Act CXCVI of 2011 on national assets, Act CCVIII of 2011 on the Magyar Nemzeti Bank, Act XXXVI of 2012 on the Parliament). The above list shows well that during an exceptionally short period of time acts carrying material novelties were approved, acts which serve as foundation of society and thus function as central elements of the legal system.

VI. Characteristics of newer legislation

1. Facts and processes. Effects of the modification of laws

In advance it shall be stated that Hungarian legislation has gone through a shift of balances after the change in the political system: while in state socialism the enactment of ordinances dominated, after 1989 the dominance of the enactment of acts may be observed (in 1985 only 3% of all laws was act, while in 2005 the ratio of the same was 16%).

Between the summers of 2010 and 2011 legislation was extremely „revolutionary" in Hungary, as the 266 approved acts (from which 95 were brand-new, while 171 were modifications of previous acts) and 172 decisions of the Parliament significantly exceed the annual statistics of the first years of previous governmental cycles (before and after the change of the political system in 1990). In the previous cycle between 2006 and 2010 these numbers in total are 263 (new) and 328 (modification).

Almost one-third (!) of the acts enacted in 2011 were modified in the same year: in December 63 of the 213 acts approved in 2011 – which was a new record – were modified. In the normal course of work modifications of acts are usual parts of the tasks of the Parliament, but it definitely does not fulfil the requirement of legal certainty if a newly approved act is modified several times in the same month, especially, if such modification often affects a whole „network" of laws. Such quick and comprehensive flow of acts and their modifications brings uncertainty to all players, as these are not easy to interpret in the first place, and often it is impossible to prepare for them.[257]

It is also worth mentioning that in December 2011 during one month 18 acts were modified which were enacted in December, 5 of them were modified several times. The act about the modification of acts serving as basis for the budget was rewritten six times by the legislator in this period. The acts on taxation, on personal income tax and on duties were each modified eleven times in the last month of the year. The act

257 Tax laws rewritten in every four days. *Index* 18 January 2012 www.index.hu

on education was affected by ten acts enacted in December, the one on higher education was modified eight times. The acts on public employees and civil servants were changed eight times, each, while the act on civil procedure was modified nine times. The modification of tax laws shall be announced thirty days in advance, according the valid regulations, thus the announcement of the modification of the act on certain tax regulations and some other related acts was made on 29 November, just to „rethink what they exactly want during December and modify it seven times by the end of the year". [258]

Regarding the outlined phenomenon we shall definitely state that this – in international comparison – cannot be viewed as exceptional, maybe its degree and intensity are extraordinary.

It is necessary to state also that the number of newly enacted acts significantly influences the number of other legal instruments; as once the great Hungarian poet – Miklós Radnóti – put it in his poem Tünemény (Illusion):[259]

(...)
And as act alone cannot stand,
Sprawled along numerous ordinances.
(...)

In case of the „sprawl" of laws necessarily and from time to time a natural need arises in each legal system – thus also in Hungarian – for deregulation, for the maintenance and improvement of the transparency and operability of the legal system.

Deregulation itself results in capacity expansion, so far as through the filtering of parallel, controversial regulations, the „reduction of the burdens" of the legal system, merely the reduction of the rules to be complied with by citizens it increases the chances of law abiding. The validity of law – at least in legal sociology approach – also depends on the answer given to

258 Ibid.

259 Réz, Pál (ed.): *Radnóti Miklós összes versei és versfordításai. [Poems and translations of Miklós Radnóti.]* Nagy Klasszikusok. Szépirodalmi Könyvkiadó, Budapest, 1987. p. 296.

the question that at what degree of probability it may be stated that the given law will be applied[260], and this latter may seriously depend on the „accessibility" of law, which at the same time means chances for getting to know the law and clarified norm contents.

Act LXXVI of 2012 which was enacted upon the draft law – no. T/6957 – about the technical deregulation of certain acts and provisions for the abolishment of the over regulation of the legal system, submitted by the Government of Hungary in April 2012, in several steps annuls laws which form part of the legal system but have no material legal effect (e.g. from laws regulating economic order the legislator abolishes 250). Some will become null and void already in 2012, some others in the coming years, but there are some which will be repealed on 1 January 2020. According to the reasoning the government – as part of the Magyary Zoltán Administration Development Programme – initiated the deregulation of laws „the annulment of which does not cause legal uncertainty". Based on the 41 pages long governmental decision which is mainly composed of the list of laws to be annulled the abolishment of the given provisions does not affect legal relationships, rights and obligations originating, abolished or modified upon them.

Regarding the modification of acts at any time – as it has been mentioned – Péter Paczolay – placing the issue into a broader context – says the following: „The legislator makes the general rule, but several situations exceed this rule. One possible, though rather scary answer to this is casuistic, when the legislator tries to regulate every possible scenario in advance. The other answer is the constant modification of laws, which contravenes with one principle of the rule of law defined by Locke, the requirement of the existence of permanent, but at least long-lasting laws. The third solution – evident for and favoured by conservative legal approach – may be the judicial development of laws (the legal development role of the Curia)."[261]

A special case of the modification of acts (laws) is the modification of the constitution. In Hungary we shall pay especially careful attention to this, because – as it has been mentioned before – our previous

260 Tamás op. sic. 144. o.
261 Paczolay (2011)

Constitution was modified several times till 2010, and – despite the short period of time which passed since its approval – the new Fundamental Law has also been changed. Among the special effects of this only one will receive special attention this time: the effect of the quickly changing constitution to the „monopoly of the interpretation of law". „As only the Constitutional Court has the competence to interpret the Fundamental Law in an authentic way and with final force (…) – state Csink and Frölich in their newest work. Regarding this it may be stated that where the constitution is stable, this competence may in reality be primarily and practically centralised in the hands of a constitutional court. However, when in Hungary the changing speed of the all-time fundamental norm is quite high in all aspects (in the examined period of time, till the enter into force of the Fundamental Law the Constitution was modified 12 times)[262], it is impossible to avoid the interpretation role of the Parliament – in some ways as competitor of the Constitutional Court – which is mainly expressed in a way that as practical consequence of its own interpretation of the laws and/or with regard to the expected decision of the Constitutional Court the legislator modifies the law. This special, but still material (and sometimes preventive) „interpretation" via „legislation" is extremely important when it may also be assumed

262 The previous constitution was modified several times in the examined period:
Act CXIII of 2010 on the modification of Act XX of 1949 on the Constitution of the Republic of Hungary;
Act CXIX of 2010 on the modification of Act XX of 1949 on the Constitution of the Republic of Hungary;
Act CLXIII of 2010 on the modification of Act XX of 1949 on the Constitution of the Republic of Hungary;
Act LXI of 2012 on the modification of Act XX of 1949 on the Constitution of the Republic of Hungary necessray for the establishment of certain transitional provisions related to the Fundamental Law;
Act CXLVI of 2011 on the modification of Act XX of 1949 on the Constitution of the Republic of Hungary;
Act CLIX of 2011 on the modification of Act XX of 1949 on the Constitution of the Republic of Hungary;
and further on in the spring-summer of 2010 six more unnumbered acts were approved „On the modification of Act XX of 1949 on the Constitution of the Republic of Hungary".

that the Hungarian Parliament as legislator in some regards – e.g. in the field of public expenses – wished to reduce the list of issues belonging to the competence of the Constitutional Court.

2. Newer laws regarding legislation

The Constitutional Court annulled the previous act on legislation, act XI of 1987 (herein after referred to as Jat.) as of 31 December 2010 with a decision made in December 2009.[263] According to the decision of the Constitutional Court the scope of laws and their hierarchy, as well as the topics which may be regulated exclusively in act of Parliament shall not be regulated in act. According to the Constitutional Court the regulation of such subjects shall always be the task of the constitution. Therefore the previous act was practically a constitution level regulation, which is not in conformity with the legal order (hierarchy of legal sources) of the republic, which declares the primacy of the constitution. The makers of the Fundamental Law and the new act on legislation – Act CXXX of 2010[264] – proceeded in line with this guideline.

It is an important change in the new regulation of legislation that Act XXXVI of 2012 on the Parliament and Act CXXXI of 2010 on social participation in the preparation of laws receive their own role. With regard to the former one it shall be stated that the existence of the act is the result of the innovation according to which the more important issues – in relation with detailed rules regarding the organisation and operation of the Parliament – shall be regulated in act.[265] As result of this some regulations of the Standing Orders [46/1994 (IX. 30.) OGY decision about certain provisions of the Standing Orders] which served the same purpose earlier (together with some new rules) „were raised" to the level of acts, while the significantly modified (and shortened) Standing Orders also remained in force.

263 Constitutional Court decision 121/2009. (XII. 17.) AB

264 About the new act on legislation see in details: Csink, Lóránt: Mérföldkő a jogalkotásban. (Milestone in legislation.) *Új Magyar Közigazgatás* 8/2011. p. 2. [hereinafter referred to as Csink (2011)]

265 The preamble of the act metions as specific reason for the creation of the act the intention to „formulate certain provisions of the Standing Orders at level of an act".

A novelty of the new act on legislation is the more accentuated regulation of the institution of previous and subsequent impact assessment, even though the new act also lacks specific methodology. Preliminary impact assessment is the task of the drafter of the act, while the subsequent impact assessment is conducted by the minister if it is necessary in order to measure how much the regulation makes the effects expected at the time of its preparation. *Theoretically* this could significantly contribute to the improvement of the quality of laws.

At the time of examination we shall not disregard of requirements and specifications deriving from our membership in the European Union and from our other international obligations; within this scope we only indicate that the quality and actual application of „internal" law is significantly affected by the characteristics of adaptation mechanisms. We shall state that „in the relationship of the reception of law and national legislation spontaneous, forced and active adaptation may be determinative at the same time".[266]

Regarding legislation we shall further stress that in addition to provisions set forth in law attention shall be also paid to the political document called the *Declaration of National Cooperation* – made in 2010 – in one wishes to systemize the norms relevant within the scope of legislation in Hungary.

3. Internal characteristics of legislation in Hungary after 2010

3.1. Attempt to approximate law and reality

A specific phenomenon has been mention before, which by mixing reality and law is able to establish changes also in fields where no material social-economic changes happen. In parallel with this, however, the approximation of law and reality, their more harmonious relationship is one of the answers of the legislator to the new social and economic challenges: e.g. according to Act XC of 2010 on the enactment and modification of certain acts regarding economy and finances *some*

266 Szigeti (2011) pp. 170-171.

household jobs,[267] *are taken outside of the tax system*,[268], as reaction to the fact that no tax has been paid after these; the supervision of these activities is (traditionally) very difficult, and the fact of taxation was unfair in some aspects. Therefore, the modification of the law only establishes reasonable relationship with (adjustment to) reality, with significance which goes beyond the fact of deregulation.

3.1.1. Simplification and its consequences

Nevertheless the „simplification", „clarification" of the legal system, if made at high speed may violate guarantees even if behind the new provisions there is an intention to adjust the law to traditional and actual practices. For this let us examine an example, the separate act on government servants breaking the previous unified system of regulation about civil servants (Act LVIII of 2010 on the status of government servants; herein after referred to as: Ktjt.), which introduced several specific solutions. Among the new solutions the sharpest debate arose about the regulation of the termination of the employment, which greatly differed from the previous system. According to this the termination of the employment relationship of a government servant shall not be reasoned. This is in definitely in contrary to the fact that even in case of a simple employment relationship article 89 paragraph (2) of Act XXII 1992 on the (former) Labour Code[269] (herein after referred to as Mt.) obliged the employer to give reasons for the termination of employment, then regulated further material and former

267 According to the law household works are the following activities ensuring the everyday living conditions of the natural person and persons living in his/her household, as well as his/her close relatives: cleaning of the house, cooking, laundry, ironing, supervision of children, their home education, home care, house management, gardening.

268 Income outside of the tax system is a benefit which is given by the employer to the household employee as remuneration for the household works. In relation with this payment neither tax declaration nor tax payment obligation burden the employer or the household employee.

269 In the meantime the new Act I of 2012 on the Labour Code was accepted, which – in line with domestic and international trends – eased the rules of the termination of the employment relationship my the employer.

guarantees related to the termination in paragraphs (3)-(5) of article 89. The regulation of the guarantees related to the termination of the employment of civil servants (e.g. the relative limited options for the termination of employment) is often interpreted in a way that it ensures further rights to the civil servants compared to mere employees because in return they have further obligations. But due to the mentioned modification government servants were not protected at all, not even with the guarantees which entitle every employee in general.

The Constitutional Court's reasoning – in relation with this change – focused on the fact that the rule of law does not contain the requirement of legality with regard to administrative authority actions, but the requirement of legality of public administration also covers all acts of public administration authorities in which public administration makes decisions which affect the rights of clients. Therefore regarding the examination an important requirement originating from legality is that the material legal framework of the employer's decision is defined by law.

According to the reasoning of the modification of act approved half year after the establishment of the new government it „provides opportunity for the establishment of quality professional staff and for the improvement of the level of work performed for the public". The reason of those opposing the modification – beyond legal arguments – was that the act was preparing the ground for the cadres of the governing political forces to spread into public sphere, while it paralyses the present civil servants, forcing them to be servile.

In its 8/2011. (II. 18.) AB decision the Constitutional Court considered this provision unconstitutional – as the only one among the objected provisions of the Ktjt. – analysing the issue for long and objecting to the provision from several aspects: the Constitutional Court held Article 8 paragraph (1) b) of the Ktjt. unconstitutional, it found that the provision violated the principle of the rule of law as set forth in Article 2 paragraph (1) of the Constitution, as well as the right to work declared in Article 70/B paragraph (1), the right to hold public office described in Article 70 paragraph (6), the right to court regulated in Article 57 paragraph (1) and the right to human dignity, as formulated in Article 54 paragraph (1) of the Constitution, therefore annulled it.

A similar provision of the Ktv. [Article 17 paragraph (1) of the Ktv.: „The employer may terminate the public service relationship without the obligation to provide reasons"] was annulled by the Constitutional Court later, with its decision 111/B/2011 AB. In addition to this there were further consequences of the regulations contrary to Hungary's international obligations: according to the decision of the European Court of Human Rights (ECHR) in Strasbourg Hungary shall pay as compensation more than 3 million HUF (9,000 EUR with interest) to a former public servant, whose contract was terminated without reasons in the fall of 2010. In the mentioned case it is an important element that the ECHR accepted the claim in the first place, stating that the petitioner could not (have) expect(ed) legal remedy within a reasonable period of time in Hungary (the main argument of the Hungarian government was that the former public servant should have resorted to labour court in Hungary).

Based on the provisions replacing the annulled regulations (Article 63 of Act CXCIX of 2011 on public officials and Article 229 stating the differences regarding civil servants) governmental service relationship may be terminated – among others – if the *„government official loses the trust of its superior"*.[270] This newest regulation is quite problematic. Based on the comparison of Article 66 paragraph (1) and Article 76 paragraph (2) one of the most ambiguous, least provable aspect of the loss of trust is the *lack of professional loyalty* for the superior. According to the act „Professional loyalty means especially commitment to professional values set by the superior, cooperation with superiors and colleagues, performance of tasks with professional commitment, in a disciplined and thorough way." It is not a coincidence that Jácint Ferencz puts it in a way that these (loss of trust, professional loyalty) are „objectively not clarified" notions, which „have no place" within the „gravest sanction regarding employment relationship, the termination of employment". [271]

In summary, with regard to those analysed in this subsection we may state that it is not possible to introduce new regulations either in

270 Article 63 paragraph (2)

271 Ferencz, Jácint: Jogszerű jogbizonytalanság? [Lawful legal uncertainty?] *Miskolci Jogi Szemle* 1/2012. p. 103

harmony with some – sometimes century old (!) – practices or speeding up some processes desired by the government in contrary to important legal guarantees (or at the price of their cutback).

3.2. Symbolic legislation

Due to the previously analysed reasons and at the earlier mentioned ways post-2010 Hungarian legislation significantly carries the features of symbolic legislation, through the following phenomena:

a) *Abstract presence of new (basic) principles and theories in certain legal documents*
In some regard symbolic legislation has the task of presenting gradualism in the transformation of the legal system. Instead of a positivist way of thinking or legal approach built on individualism and liberal foundations a radically different legal order and citizens' attitude cannot be established from one day to another. As it has been mentioned before – as a possible way of development – the positive law – relative natural law – Christian natural law course cannot be thriving during one parliamentary cycle. The inclusion of some principles – with weaker value – into the legal system may be performed only step by step, as a process. A good example for this from principles present in the Fundamental Law is the requirement of sanity, as an obligatory starting point of interpretation; about which it may be expected only later that it will be materially, textually explained and/or its real meaning will be elaborated in the legal practice.

b) *Presence of specific enemy picture and well defined points of reference*
It is enough to refer again to the basic concept of the Fundamental Law and the Aár. based on the delegitimization of the past, in which there are, simultaneously present – in an accentuated way – the reliance on the past and the intention to delete the past, through *a kind of selective recycling of the past*.

3.3. Legislation, as an answer given to the failure of previous products of legislation

Another important phenomenon regarding Hungarian legislation is that often certain legal instruments appear as answers given for the failure (i.e. inapplicability) of previous products of legislation. There is nothing special in this – in itself – provided that a deregulation based on the rule of law happens continuously and consciously. One of the real difficulties in this case, however, is *that in the past several times the legislator missed to observe properly whether the given situation shall be influenced by legal norm, or a social norm or system of norms would be more suitable to settle the given field.* Thus, the selection of the most appropriate form of norm meant and means also today the most problematic issue of legislation.

The failure of the previous legal instruments was especially obvious in the fields influencing financial, economic relationships: e.g. criminal law measures applicable for legal persons,[272]*, the previous act on lobbying,*[273] *or the act on volunteer work which aimed at repressing black work,*[274] *may be mentioned as deterrent examples. Even though these are (were) formally part of the legal system, they have never been really used..*[275] Why not? It has become clear that the law tried in vain to simulate, replace the moral texture, material of society; the law – in itself, without other supporting norm types – cannot create an autonomous moral reality, the structure of simply becomes overloaded and inoperable. [276]

272 Act CIV of 2001 about criminal measures applicable against legal persons.

273 Annulled in December 2010

274 Act LXXXVIII of 2005 on volunteer public service

275 According to the statistics of the Office of the Parliament for example the number of events held formally announced by the lobby act (Act XLIX of 2000 on lobbying) was about 20-25 (!) in each quarter of a year, which is just fragment of that activity which was probably realised as lobbying. The fate of rules prescribing the registration of volunteers was similar, the number of registrations may be measured in thousandths in comparison with the actual volunteer activities [according to Article 11 paragraph (1) of the act the receiving organisation shall register it in advance at the minister for the development of social and civil relationships on the Registration form annexed to the act].

276 If we accept that „European integration has been a procedure governed by law from the beginning" (Vörös Imre: A regionális együttműködés új, hatékonyabb jogi formája az EU-ban. [A new, more effective legal form of cooperation in the EU] Miskolci Jogi Szemle 2012/1. p. 5), it may be also examined whether behind

Similar difficulties are generated in the situation when in the regulated field the basic social agreement is missing, and the legislator makes a rule without having intentions (!) to actually settle the issue. A „good" example of this latter phenomenon in the Hungarian legal system is Act III of 2003 on the Disclosure of the Secret Service Activities of the Communist Regime and on the Establishment of the Historical Archives of the Hungarian State Security. A basic function of the act would have been to disclose the „agents" of the previous system(s), but based on legally grounded regulations and legal practice one may be called an „agent" only if at least two of the following three criteria are met: his/her own signature is stated on the declaration to join the organisation, there is his/her own signature about the reception of material remuneration, and other document exists which proves the activities as agent. Even though it may be well estimated that during the years of state socialism about 200,000 people were roped in in Hungary, due to the above mentioned conditions (evidences to be proved) this may be revealed (researched) or proven only in few hundred cases.

The greatest – and capacity reducing – danger of a legal system overloaded with such rules which cannot be fitted into the social-economic context, which are incapable of existing and impossible to use is that it establishes an impression in the public that law is powerless in general, due to which it may partially lose its authority, which is its special feature.[277]

The above mentioned bad examples partially shed light on the fact that even well elaborated law cannot abolish the reasons for the existence of and the need for individual norms, social norms and organisational norms, moreover: it becomes more and more obvious that the generality of law can be enforced only through the „inclusion" (transmission) of such norm types. The failure of the earlier act on lobbying showed that *in certain fields in case of the lack of self-regulation*[278] *- the spread of which in contrary*

the crisis symptoms of the EU (its insufficient answers given to the crises) there are – at least partially – similar reasons: ie.e the underestimation of dimensions beyond law, their stranded development regarding certain cooperation.

277 Szigeti (2011) p. 193.

278 Vincent Porter: *How Can Civil Organisations Establish a Connection with EU Institutions?* ECE City Center, Budapest, 24 February 2012 (lecture in the organisation of The Organisation and Management Scientific Association)

to central regulations is trend-like today – the state cannot step in with its additional provisions: in some social sectors permanent results may be achieved only with the permanent stimulation of self-regulating mechanisms, which is a slow, circumstantial solution but has not alternatives. This is why the new regulation on lobbying chooses the solution *that it creates obligatory rules related to the enforcement of interests on the side of the public servant receiving the lobbyist,* [279]otherwise it settles for the creation of patterns upon its own forming practice, and it trusts itself to the already established criminal law framework (e.g. crime of bribery). [280]

In Hungary this concept – which takes social reality into account – is in opposition with the opinion of organisations thinking within the previous framework. Therefore in 2012 Amnesty International, Greenpeace, the Hungarian Civil Liberties Union and others wrote a joint petition to the minister of public administration and justice, resenting that after 2010 it was not regulated on the merits in which ways companies and economic interest groups may influence the central power: Article 19 section b) of Act CXXXI of 2010 on the participation of society in legislation (herein after referred to as: Trj.) annulled Act XLIX of 2000 on lobbying without replacing it with proper regulations. The possibility of strategic partnership ensured in Article 13 of the Trj. concerns only a narrow field of the enforcement of interests, within the framework of which ministries may establish direct relationship with these organisations which are ready for mutual cooperation, and which present wide social interests in the preparation of legislation in the given field or perform scientific activities in the given field. This act is far from the proper regulation of lobbying. It provides for cooperation exclusively with ministries, even though lobbying is more than participation in legislation at ministerial

279 The form of this is *permitting the reception of external partners representing private interest by officials and its publication procedure.*

280 It is also a parallel – and within Hungarian administration a long disputed – issue that at what level and at what depth professional ethical noms within the public service shall be regulated; under the egis of the Magyary Zoltán Közigazgatás-fejlesztési Program (Magyary Zoltán Public Administration Development Programme) a new approach seems to be gaining strength, which – within legal frameworks – would ensure more freedom to the self-regulation of those concerned.

level: every activity aiming at influencing the decisions of the central power or at enforcing interests shall be considered lobbying." [281]

The issues analysed in the present subsection may be approached also in a way that „along the formal notion of legal certainty at what degree would the law be able to interpret and resolve social conflicts [exclusively] with its own tools"[282] and at what degree will the law be able to determine the „limits of the acceptability of social needs".[283]

3.4. Scope and features of the legislation process

3.4.1. New contents of the notion of cooperation

This paper deals in several subchapters with certain negative phenomena of state-social life, often the common origin of which is the discrepancy between political intentions and real social needs, and legal norms trying to formulate the former ones. Every solution or reparation attempt made in the examined period refers to the notion of cooperation, which we may consider to be the most important aspect regarding the latest legislation. Due to the change of the government in 2010 several new ideas have been presented also in this field, but the most significant changes cannot be necessarily interpreted as legal institutions. Even though the idea of establishing a two-chamber parliament was also raised during the drafting process of the new constitution, this idea was finally rejected.

Among the tools of including the concerned elements of society into the decision making processes the government operating since 2010 rather prefers the non-legal ones (i.e. those which do not constitute direct obligations for the government); rather solutions outside of the legal system are put into focus. Therefore the so-called *national consultation*, which – among others, such as sectoral, professional and other negotiating

281 Letter of TASZ; http://nonprofit.hu/?q=content/civil%C3%B6sszefo%C3%A1st-kezdem%C3%A9nyez-tasz-lobbit%C3%B6rv%C3%A9ny%C3%A9rt

282 Egresi ,Katalin: A jogbiztonság, az igazságosság és a demokrácia a jog mérlegén. [Legal certainty, justice and democracy on the scale of law.] 2012. p. 147.

283 Egresi op. sic. p. 148.

forums[284] – introduced in Hungary a previously unknown political technique: within two years – in ordinary mail – each citizen received two surveys with possible answers to choose from,[285] furthermore, – as a method not really used before in Hungary – an information booklet was sent to all citizens with the right to vote which presented the newest pieces of legislation.[286] The political framework of different consultations is the political declaration about the National Cooperation made in 2010, which established the System of National Cooperation. This document – prior to the Fundamental Law – describes the relationship of the parliamentary majority, through them the whole nation to the past and their preferred values. Therefore – among others – we may read the following: „*At the end of the first decade of the 21st century, after forty-six years of occupation, dictatorship, and two ambiguous decades of transition, Hungarian has regained its right to and capability of self-determination"* and *„The National Assembly declares the inception of a new social contract in the elections held in April whereby Hungarians decided on the creation of a new system, the System of National Cooperation. With this historical deed the Hungarian nation has committed the newly established National Assembly and the new government to resolutely, uncompromisingly, and steadfastly direct the work with which Hungarian is going to build the System of National Cooperation."* furthermore *„We, the representatives of the Hungarian National Assembly, declare that we are going to build the new political and economic system formed on the basis of the democratic will of the people on the pillars indispensable to happiness and a respectable life,*

284 We may consider as such the National Cooperation Forum of Local Governments, which is a body performing official negotiations between the Government and local governments.

285 For example the 16th question of the „National Consultation 2012" survey was the following: „There are some people according to whom the government shall protect the purchasing force of pensions also in times of crisis. In the opinion of others this is not possible. What do you think?" For the question an answer had to be chosen from the following three options:

- The government shall further protect the purchasing force of pensions;
- During crisis it is not possible to maintain the purchasing force of pensions;
- I don't know.

286 Such information was provided by the „Job protection action 2012" letter sent to each citizen in the summer of 2012.

and which bond the diverse members of the Hungarian nation. Work, home, family, health, and order are going to be the pillars of the future."

Looking beyond political slogans and pathetic forms *it may be well observed that the government expects from the method of crowdsourcing* – which may be considered traditional in other countries – as well as from different online consultations and the introduction of new means (surfaces) of information the establishment and deepening of discussion (cooperation) with society. Among the new means of information we shall mention that the government of Hungary created its websites civil.kormany.hu and kozhasznusag.kormany.hu related to the civil sector (in broader sense about legislation related to the civil sector), which wish to provide information to domestic civil organisation about the new legal background and information related to them, in order to support their operation. The websites – according to the intentions of the government – are part of the process of changing the attitude aimed at with the new act on the civil sector (Act CLXXV of 2011 on right of association, non-profit status, operation and support of NGOs), through which the government wishes to establish transparent connections with the civil sector.

In Article 7 of the already mentioned new act on legislation the two basic form of social compromise are described, general negotiation and direct negotiation. The former one provides opportunity for sharing opinion on the website of the organisation publishing concepts, drafts (in a way which obliges the organisation which asks for the opinion, e.g. through confirmation obligation or through preparing summaries on the merits), while the latter one allows the concerned minister to directly request persons and organisations to give opinion. A specific form of direct negotiation – creating obligations on the side of the minister – is the institution of strategic partnership, the framework of which is settled in a thorough agreement. One material weakness of the regulation, however, is that Article 13 paragraph (2) of the act only lists in an exemplary way those with whom such partnership may be concluded, by mentioning forms of organisations (e.g. church, trade union, civil organisation).

Among the newer developments a – truly significant – framework agreement shall be definitely mentioned that was established in May

2011 between the representatives of Roma people in Hungary and the government of the Republic of Hungary about the development of Roma people. The real value of the document is represented by the fact that – contrary to previous unilateral acts – it undertakes specific, definite obligations on both sides, especially in the fields of education and employment, at the same time aiming at making the use of budget sources more transparent in the future. Regarding Hungarian Roma issue and Roma policy – as one of Hungary's most urgent issues – it may be stated that in the past thirty years the determination (political declarations, integration programs) of the different governments were usually not followed by changes of laws or *consistently performed* measures.[287] Moreover, it is worth noting here that „The material and formal equality of citizens belonging to a minority cannot be achieved simply with legal means, but it usually requires the alteration of the approaches, attitudes of society".[288]

The Hungarian presidency of the European Union (2011) set as a priority the establishment of a European Union level Roma strategy[289] in parallel of which the Hungarian – not only Roma-centred – Roma strategy was created under the title National Social Development Strategy – deep poverty, child poverty and Roma people 2011-2020, to which the – above mentioned – framework agreement made by the Prime Minister and the president of the National Roma Self-Government is formally attached.

Regarding the participation of society in legislation a double tendency has been present since 2010: on the one hand by keeping – some of – the traditional forums and forms (legal institutions) new – typically virtual – connection points have been established – not necessarily with legally obliging force, – while, on the other hand the maintenance of negative tendencies observed earlier in the preparation of laws (closed legislation, formal negotiations in compliance with the words of the law but in conflict

287 Majtényi, Balázs – Majtényi, György: Üveggyöngyhatás. Változatlan romapolitika. [Glass pearl effect. Unchanged Roma policy.] *Fundamentum* 1/2012. p. 67.

288 Ibid.

289 An EU Framework for National Roma Integration Strategies up to 2020. Council Conclusions 10658/11.

with its spirit, unreasonably short deadlines) and the abolishment of certain institutionalised forums may be observed. Within the latter scope it shall be definitely mentioned that the previously existing quasi veto right of the National Council for the Reconciliation of Interests (OÉT) – a three-sided forum of labour issues existing since 1988 (!) – has been abolished in a way that the OÉT itself gave its place to a forum bearing exclusively consultation rights and lacking the obligatory cooperation of the Government – the National Economic and Social Council (NGTT) regulated by Act XCIII of 2011. OÉT was the national interest negotiating forum of the government, the trade union confederations and employers, its operative activities mainly covered the debate on draft laws in the field of labour law proposed by the government. Its *quasi* veto right originated from the fact that agreement on minimal wage was also made at this forum.

Regarding this issue we shall note that within most member states of the European Union the forums of bilateral (autonomous) negotiations conducted exclusively with employers and the trade unions of employees, forums holding three-sided (tripartite) negotiations with the participation of the government, and the forums of multilateral consultation (civil discussion) realised with the participation of civil organisations, the representatives of sciences, churches, etc. From the changes of the Hungarian legal system (system of laws) made after 2010 it seems to be clear that the FIDESZ-KDNP considers the first and the third forms of the previously mentioned three necessary or desired.

In the search for reasons behind changes and shifts of balances it shall be definitely mentioned that today's democracy-approach – represented by the official majority – argues for the majority model of democracy, against consensual approach.[290] This statement shall be supplemented with the fact which is often referred to in Hungarian political scientific literature, namely that – in the past 25 years – between certain groups of Hungarian political elite the emergence and strengthening of competitive, instead of cooperative relationships may be observed.

290 Regarding the models see: Körösényi, András – Tóth, Csaba – Török, Gábor: *A magyar politikai rendszer.* [The Hungarian political system] Osiris Kiadó, Budapest, 2003. pp. 594-607. and pp. 618-620.

The relationship and the Hungarian form shaping of the democratic representation principle and the functional (interest) representation principle[291] presented by pressing organisations are cardinal issues – supporting the interpretation of Hungarian processes – which deserve closer observation.

It is a fact that through social interest negotiation based on the partnership and cooperation of state and society mutual information and discussion have become organic, systematic part of everyday governmental activities also in Hungary (e.g. via the publication obligation of draft laws and other textual proposals). However, it is worth developing those procedural, organisational and technological conditions which ensure that requirements of open legislation – defined earlier in Act XI of 1987 on Legislation, in Act XC of 2005 on the Freedom of Electronic Information, today in Act CXXX of 2010 on Legislation[292] and in Act CXXXI of 2010 on the participation of Society in the preparation of legislation – may be actually fulfilled in a broader scope regarding citizens and their organisations.

3.4.2. Limiting techniques in parliamentary legislation

As it has been mentioned earlier, one of the common methods in Hungary for speeding up legislation is the minimization of material political and professional debate during the preparation of laws, as well as its obligatory nature, squeezed into a narrow institutionalised scope. Among techniques minimizing substantive debate there are a) *solutions created with legal authorization* (e.g. as individual petition of an MP the preliminary and material impact assessment and social negotiation of laws may be avoided) and b) *techniques used „somewhat legally"* for a long time (e.g. the modification proposal submitted before the closing vote in the parliamentary debate of acts).

ad a) It is striking that the most important – and most criticised – acts, even complex codes (the Fundamental Law, the „nullity act"[293], the

291 Gulyás op. sic. p. 238.

292 About the new act on legislation see in details: Csink (2011) pp. 2-6.

293 Act XVI of 2011 on the redress of the verdicts in connection with the crowd

media act) were approved in the Parliament upon individual MP proposal. The most obvious tendency is the relatively high number of draft laws submitted as individual MP proposal, neglecting the provisions of Act CXXXI of 2010 on the participation of society in the preparation of law approved in 2010. „Even though proposals for the modification of the Fundamental Law submitted by MPs comply with procedural rules set forth in the Fundamental Law (…) obviously they do not fully fulfil the requirements of the democratic rule of law" – held the Constitutional Court in relation with the rejection of the proposal for the establishment of the public law invalidity of Act CXIX of 2010 on the modification of the Fundamental Law. According to the opinion of the Constitutional Court the same problems of legitimacy arise with regard to the eight modifications of the Fundamental Law proposed by MPs till July 2010: „Negotiations necessary (especially during the modification of the Fundamental Law) were missing. (…) The modifications of the Fundamental Law may carry primarily material violations related to the rule of law. The constant modification of the Fundamental Law for the achievement of some interests and goals of actual politics is extremely worrisome from the aspect of the requirements of the rule of law, especially regarding the stability, reliability of the constitutional legal system, the broad social legitimacy, and their uncontradictory incorporation into the legal system" – held the Constitutional Court.

ad b) The institutions of modification proposal before the final vote has been part of Hungarian parliamentary law for a long time, but its scope of application – especially in the past decade – has exceed the filtering of problems of coherence, which would have been the original intention of the legislator and – in parallel with this – it has become a tool of avoiding substantial debate.

E.g. to the Act LVI of 1990 on the remuneration of the Members of the Parliament on 6 June 2011 the Constitutional Committee submitted a modification proposal before the final vote for the modification [294] of the following acts: Act XL on 2008 on natural gas supply (!); act LXXXVI of 2007 on electricity (!) and act XXIX of 2011 on the modification of acts

controls in the autumn of 2006

294 Reference number: T/2224/6.

in the field of energy (!). The 12 pages long modification proposal – with the new rules and with those abolishing the old ones – significantly rewrote majority of the Hungarian energy laws, and which is most important with regard to our topic, they had nothing to do with the remuneration of the Members of the Parliament. From the brief reasoning it turns out that the modification in „necessary and unavoidable", and it shall fix the previous mistakes of the legislator, e.g. by postponing the date of entry into force of some provisions of act XXIX of 2011 on the modification of act in the field of energy…

This happened despite the fact that the old and new version of provisions of the Standing Orders [295] clarify the sole function of this legal institutions: *„Article 107 (1) Before the beginning of the closing vote a proposed amendment may be introduced in writing to any provision voted on in the debate in detail for such reason that the provision voted on is not in compliance with the Constitution or any other Act, with a provision of the bill already voted on or with any provision of the bill not affected by amendments"* and *„Article 107 (1) Before the start of the closing vote – at last 24 hours before the opening of the session on which the closing vote of the draft bill will be conducted – a proposed amendment may be introduced in writing by a committee or any MP to any provision voted on in the debate in detail for such reason that the provision voted on is not in compliance with the Constitution or any other Act, with a provision of the bill already voted on or with any provision of the bill not affected by amendments, or if the unified draft does not comply with the requirements of the structure of an act or of linguistics (…)".*

Therefore the modification proposal submitted before the final vote shall not be a tool for incorporating a completely new element into the act, but shall be a sort of tool of correction in the hand of the Parliament.

The Constitutional Court examined this issue in details in its Constitutional Court decision 164/2011. (XII. 20.) AB. In this decision the Constitutional Court held that Act C of 2011 on the Right to Freedom of Conscience and Religion, and on the Legal Status of Churches, Religious Denominations and Religious Communities is unconstitutional due to public law invalidity, as the modification proposal no. T/3507/98 rewrote

295 46/1994. (IX. 30.) OGY határozat egyes házszabályi rendelkezésekről. Decision of the Parliament 46/1994 (IX. 30.) OGY on certain provisions of the Standing Orders of the Parliament

the draft law significantly just before the final vote, thus its submission violated Article 107 paragraph (1) of the Resolution 46/1994 OGY of the Parliament on the Standing Orders of the Parliament. „(…) limiting the possibility to submit a modification proposal before the final vote to problems of coherence is an important rule related to the reasonableness of legislation, because without this – or if it is disregarded – the draft law could be conceptionally, comprehensively modified in the last phase of legislation, which practice may result in the emptying of guarantees forming part of the previous phases of legislation and aiming at quality legislation. Based on this the Constitutional Court states that the provision of the Standing Orders regarding the submission of modification proposals before the final vote shall be considered guarantee of democratic exercise of power and of activities of representatives performed for the public, therefore the violation of these shall be considered serious procedural mistake, which results in the partial or full public law invalidity of the law" – held the decision. „In European constitutional tradition the notion of act has included for a long time the procedure of legislation, more precisely certain features and the legislation process, which define the essence of the act. An essential part of this the material and public debate in advance about the norm which is intended to be enacted as obligatory and valid – explained András Bragyova in his separate opinion attached to the Constitutional Court-decision stating the public law invalidity of the act on churches. In his opinion an act „is not just any law, but a norm justified in advance in the political representation, thus in front of the public." „A necessary element of legislation is that the Parliament approves the act in a parliamentary debate – by stating pro and contra reasons. The law which cannot be preceded by a debate, for and against the justness and acceptability of which no reasons could be stated in front of the public of the legislator, cannot be considered lawfully created act."

It may also result in the change of the previous practice that János Áder President of the Republic sent back to the Parliament the modification of the media act on 31 May 2012 (anticipating the possible procedure of the Constitutional Court). The President, who took office on 2 May 2012 considered the modification of the media act perfect from

constitutional point of view, but due to a modification proposal before the final vote in compliance with the Standing Orders of the Parliament, and as result of this its public law validity may be questionable: the modification proposal of MP László L. Simon inserted a brand new provision into the draft law. The President acted similarly in case of a modification proposal submitted – and later approved – to the draft law *on the establishment of districts and the modification of related acts*, which was submitted by MP Lajos Kósa, proposing the modification of the act on gambling (!) and the act of organised crime (!). Till July 2012 the President sent back five acts – for similar reasons – but has never objected to any acts for material reasons.

3.5. Intensity and effects of legislation

3.5.1. Legislation and developmental psychology

Most modern pedagogic schools and psychologists (Maria Montessori, Rachel Cohen, Carl Rogers, Waldorf-school, etc.) agree that in the development of learning skills and the healthy development of personality there is an extremely significant role of the requirement that learning – let it be about anything – shall happen in every child's own speed. The improvement of children is determined by the sum of genetic features, specific rules of maturity, special socio-cultural background, environmental effects used spontaneously or in a planned way, and due to the joint effect of these factors children have special physical and psychological needs (and capacity) depending on age (age periods) and their personality. On the analogy of this it may be assumed – hypothetically – that just like a child, also the centrally organised state has specialities which determine its own learning (receptive) skills and its possible (ideal) methods and pace.

It may be assumed that the fast pace – compared to its possibilities and skills – education of society through legislation, in this case, may weaken the social ability and its degree to understand and adapt to rules. Naturally, the counterproductive and disfunctional effects of accelerated legislation do not only emerge on the side of the addressees of laws, but also on the side of the legislator, already in the process of legislation:

according to an assumption which could be proven by sociopsychology, entities authorised with legislative power have objective and general limits which make it impossible – or at least unlikely – that legislation above a certain pace could be suitable to realise the desired goals in full or in part (therewith the correction of mistakes originating from accelerated legislation and the reduction of political trust in correlation with the quantity of mistakes may significantly lower, or in some cases may fully abolish social level advantages desired from the given legislative product).

All that has been mentioned before is true also for law enforcement: the missing „settlement" time for laws can seriously affect the quality of legal practice, and – in a narrow interpretation – the correctness of certain interpretations of law by authorities. (For this see in details subchapter VI.3.7 about the „phantom pain" of the legal system.)

3.5.2. Accelerated legislation, faster than thinking…

Too fast legislation, therefore, may be the cause of several disfunctions; it may make the goals, processes of the legislation difficult to follow, as well as the content of law, moreover, it may cause serious extra costs: To the latter one the case of ITD Hungary, a state non-profit organisation is a good example. In the government decree no. 265/2010 on the National External Trade Authority (HITA) the legislator made an obvious mistake, because the HITA would have taken over completely the role and tasks of the ITD Hungary, therefore – with some simplification – the change of the sign-board would have been enough for continuous operation. The company, however, was dissolved without legal successor, thus could not leave the files, statistics, databases, staff and equipment to the HITA. The ITD Hungary is in operation today (August 2012) – almost two years after the decision made about its dissolution, – but it has not been performing material work, it only caused approximately eight hundred million HUF extra costs to the state. The reasons seem to be simple: only days (hours?) passed between the political decision, the political „order" and the actual legislation, this is why a huge mistake was made during the preparation phase.

The speed of transforming political intentions into legal decisions may lead to unexpected difficulties also in personal issues, especially of the participants of the public law process are not familiar with the content of valid laws… According to the previous Article 69 of Act XLIII of 2010 on central state administrative authorities and the legal status of members of the Government and undersecretaries of state „at the Office of the Prime Minister there is no undersecretary for administration, the activities of the deputy undersecretary of state operating at the Office of the Prime Minister are performed by the undersecretary of state directing the Office of the Prime Minister and the Office of the Prime Minister is divided into main departments and departments." Despite this on 29 May 2012 János Áder President of the Republic appointed Péter Szijjártó and Tibor Győri as undersecretaries of state for the Office of the Prime Minister. One week later the Parliament corrected the situation in a way that it modified the act, introducing the institution of under-secretaries of state for the Office of the Prime Minister, in addition to the under-secretary of state directing the Office of the Prime Minister.

Another example of ad hoc legislation – focusing on momentary interests against calculability – is Appendix 1 of Act CXXXIX of 2005 on higher education, the subtitle „Non-state colleges" was modified by Article 42 of Act XCVI of 2011 on the modification of acts about certain economic issues (!). The basis of the modification was the closure of a church college. Article 2 paragraph (4) point d) of Act CXXX of 2010 on Legislation states that during legislation the legislator shall observe the professional requirements of legislation; among these – despite the opposite practise of the past decades – there is the unavoidable need that at least some logical connection shall exist between the title and the content of the law…

In addition to the above mentioned, however, there are/may be some subsidiary advantages of „hard-pressed" legislation. In case of regulations the text of which is unchanged for decades – e.g. rules that were the same before and after the change in the political system – there is a danger that (for those who did not participate in their establishment) the knowledge of principles, moral rules, customs justifying the creation of the rule may fade away and the rule becomes the final argument, the

starting point of the argument. *In comparison with this the state of permanent legal revolution, the – temporarily – incalculable relationships may bring about the subsidiary advantage that they necessarily result in a need for clear reasoning, and eventually for public agreement in background moral considerations.*

3.5.3. Establishment of „rapidly responding" law

The accelerated speed of legislation – partly – may be justified with the forced adjustment to the stormy speed of external social-economic changes. The category of *blogger* has emerged, for example, someone who functions as a one-man legal institution despite the fact that he is a natural person, and who cannot really be interpreted within the categories of traditional law; whom the law cannot supervise or limit neither in his effect nor in his activities; he may be used, at best. The legislator has to face phenomena the effect mechanisms of which sometimes cannot even be interpreted within traditional dogmatic supplementary categories.

3.6. Weakening of the aspect of legality

Among the products of Hungarian legislation after 2010 we may find one which – as the „veterinary horse" of the Hungarian legal system – carries almost all – herein examined – „illnesses". The act on churches may be considered as such, which is in reality two acts, as the first attempt – Act C of 2011 on the Right to Freedom of Conscience and Religion, and on the Legal Status of Churches, Religious Denominations and Religious Communities – was abolished by the Constitutional Court due to public law invalidity (see subsection 6.3.4.2). Act CC VI of 2011 on the Right to Freedom of Conscience and Religion, and on the Legal Status of Churches, Religious Denominations and Religious Communities which replaced the previous one was approved on 30 December 2011 and entered in to force on 1 January 2012. The new act(s) turned majority of churches previously registered in Hungary – upon the force of the law – into association.[296] In case of Act CC VI

296 E.g. Article 34 paragraph (1) of Act 2011 on the Right to Freedom of Conscience and Religion, and on the Legal Status of Churches, Religious

of 2011 this brought about serious, *immediate* financial consequences with regard to churches transformed into associations (loss of benefits, allowances, establishment of new obligations), and the last day of the year was (could) not (have been) enough to prepare for this (e.g. upon the tax and social security contribution payment obligation after the payment of the December salaries), and to establish the framework of the new economic operation. With regard to Act C of 2011 the same problem emerged with an opposite sign, as the act did not settle the deadline for dissolution (transformation into association): based on Article 36 of the act it was unclear how many days or months would given organisations have had – after 1 January 2012, the enter into force of this provisions of the act – to decide about their dissolution [to make negative declaration about their further operation – as paragraph (1) of the act put it].

The freedom of religion, and religious activity itself, as well as the regulation of the conditions of being recognised as church are issues which are quite actual, and not only the interest of certain specific sciences, but general public interest is directed at these. This is why it should be stressed that the most significant and „classic" mistakes continuously made during the „cultural history" of Hungarian legislation may be mentioned also with regard to these two acts: 1) the existence and depth of both preliminary and subsequent impact assessment is questionable (especially with regard to the final, approved text versions); 2) those most concerned by the subject of regulation were not included or only in a symbolic way; itemised law content appeared as direct result of certain isolated – therefore ad hoc – political decisions. The lack of material impact assessments may probably be traced back to the fact that the previous Act IV of 1990 on the Right to Freedom of Conscience and Religion, and on the Legal Status of Churches was an act which was considered quite liberal in European comparison, a well operating act with clear legal practice. Even though the reason for the establishment of the new laws – in the opinion of the legislator – was the stepping up against various abuses, domestic law enforcement authorities detected only one (!) such action (abuse) during 20 years.

During the evaluation of the law, therefore, it shall be clarified in advance whether problematic practice related to the previous act and the registration of churches built on the act, as well as the handling of financing abuses were *manageable only through a new act?*

It is a fact that in the past twenty years the registration procedure of churches was mere formality, mainly because courts in their examination did not go beyond the declarations of petitioners and the documents handed in by them: neither regarding the genuineness of documents – of the enclosed facts – nor the real reasons and aims of the organisation to be established. Therefore, if upon the submitted documents there was a slight legal and somewhat religious goal, registration – usually – was made automatically. The basic dilemma was the same: the aggravation of legal practice should have been made in a way that it should have not violated legal certainty, the requirement of reliability and the practical enforcement of certain rights. With the new act the legislator tired to cut through the Gordian knot with one hit: practically – with some simplification – it transformed the problem which earlier existed as primarily matter of interpretation into direct political question. It is a fact that earlier courts were „careful" not to measure any other – e.g. moral – aspects in addition to the examination of the technical conditions. The legislator set the courts free of this obligation, but it is a question whether with the direct participation of the Parliament it created a system which – as sort of contrary to the previous one – is radically subjective and raises the „authoritative" task of the recognition of a church to a level infected with everyday politics.

Newer Hungarian and international legal literature[297] established after 1 January 2012 hold it against the act – in addition to the circumstances of the creation of the acts – that even though the legislator tied the acquisition of church status to more or less objective conditions, in case of decisions tied (in case of parliamentary support act, in lack of it decree of the Parliament) to a 2/3 parliamentary majority regarding the recognition of church status it cannot be assessed that based on what criteria these decisions are made, whether legal criteria defined in the act are met, and there is no possibility for remedy against them.

297 David Baer: Two Open Letters from Hungary. *Religion in Eastern Europe* 2012/2. 15.

Among thwartings related to the act we shall mention that Act VII of 2012 on the modification of Act CCIV of 2011 on the Right to Freedom of Conscience and Religion, and on the Legal Status of. Churches, Religious Denominations and Religious Communities increased the number of religious communities recognised by law as churches from 14 to 27[298] while in parallel with this the Parliament rejected the petition of 66 former churches (religious communities) with its decision.[299] The reasons for the positive or negative decisions were never – officially – communicated to those concerned.

There are two acts, therefore,

a) the necessity of which is not well justified;
b) the creation of which does not comply with legal and professional requirements defined for legislation;
c) in case of which the deadline for the performance of obligations is not interpretable or is improperly short;
d) in case of which it is easy to interpret what (political) requirements the religious group which is striving to get church status shall fulfil, and
e) in case of which the possibility of effective remedy, i.e. the right to appeal is missing.

3.7. The phantom pain of the legal system

Article 7 paragraph (4) of the already mentioned Act C of 2011 stated: „The name church may be used only by organisations registered in compliance with the law". This was worrisome especially with regard to the fact that the word church is not primarily itemized law category, not a notion used to describe a type of institutions, but is a popular and biblical, as well as theological phrase used for the description of those in Christ, the community of people following Christ and the body of Christ. It is doubtful whether the use of this word may be prohibited

298 In case of other religions only a common name is indicated in the appendix, therefore in fact we may speak of 32 churches, instead of the list containing 27 items.

299 Decision of the Parliament 8/2012 (II. 29.) OGY on the rejection of recognition as church

to a lawfully operating religious organisation which is (should be) registered. Based on this consideration the new act on church, Act CC VI of 2011 does not contain this provision. The fact that makes this situation existing from 1 January 2012 interesting is that since the spring of 2012 the Metropolitan Court of Budapest does not allow the use of the word church in the official name of organisations transforming from church to association. Based on the requirement of the validity of names it states that the use of the word church may be specious in the name, even if at the same time it also contains the word association (as clear reference to the type of organisation).

This phenomenon is nothing else but the *phantom pain of the legal system*: the relevant provision is not in force any more, but the legal practice – with reference to a forced legal argument – enforces the previous construction. Among the reasons for the behaviour of the law enforcer – in this case the Metropolitan Court of Budapest – political loyalty may appear – beyond constrained professional factors, – but another factor which shall be stressed is the high pace of „law changing", which surely worsens the chances for the proper, adequate interpretation of the law. Only such extremely distracted law making may result in such extreme phenomena, when the law enforcer's need for stability is stronger than the rules of itemised law… In the concrete interpretation issue the case is even more complicated because the information booklet sent by the Ministry of Administration and Justice on 1 February 2012 to religious communities transformed from church to association contains – word by word – that the „[association] may use the name church".

3.8. Self-destructing law

The intentions of the law to destruct itself are shown in several ways, this subsection will present three of them. These solutions are not necessarily new legal technical solutions, but their frequency of occurrence and application is unquestionable higher today than ever before in the past decades.

a) The first set of cases is when the law defines in advance that the law itself as a whole or its part when shall lose effect [300] This phenomenon is a necessary part of a properly flexible legal system, especially, that this is the most common technique of the „cancellation" of laws modifying other laws out of the system. However, it is important that the degree of „deregulation automatism" itself may be the generator of certainly surrounding the essential content of law, and through this of the decrease of general public trust for law. These laws containing modifications – in „omnibus" laws modifying several acts at the same time – often indicate only paragraph numbers, and as free legal databases only contain law valid on that given day, without serious practice in law reading and expertise in the given field it may be very difficult for the citizen to find the law on his own even in rather simple questions, when the goal would be to define what the law will be in the given field (in case of the late entry into force of certain provisions) on 1 January 2013 or even a year later…

b) The second possibility is when the valid, but not yet effective law is abolished as a whole, or – and this is more frequent in the examined time period – some of its provisions are modified. This option is mentioned in Article 9 paragraph (2) of the new act on legislation as an extraordinary option, stating that „If the goal of the regulation cannot be achieved otherwise, the authority with legislative competences may regulate it in law that the valid but not yet effective text shall enter into force with text different from that approved, or that the valid, but not yet effective law or legal provision shall not enter into force." This solution has become quite popular, moreover, quite general, increasing uncertainties related to the content of the law.

c) A special feature of the overly strengthened transparency of legal system and the system of laws is the broadest scope of „self destructing law", which at the same time may be considered the realisation form of symbolic legislation. Compliance with the criteria of the rule of law is closely attached to the „self-picture" of legal systems, which in practice usually include the values of transparency

300 See e.g. Article 6 paragraph (4) of Act CXXIII of 2012

and accountability as well. Forcing it as one-sided, *absolute value*, however, may result in surprising consequences: The National Tax and Customs Authority (NAV) started enforcement procedure against itself – it turns out from the list published by the tax authority[301] Public debts will be strictly collected – decided the NAV in 2011, and since 1 April 2010 the authority itself is listed in its own list of organisations with leeway. „The area of movement of the authority for financial management is quite narrow, the organisation has everyday financial problems. Therefore exceptionally it may happen that the NAV has some debts – it is stated in the declaration of the tax authority. It is also added that the NAV is not exempt from the enforcement of the laws, therefore if enforcement procedure is started against it, the organisation is listed in the in list of such debtors published on the Internet.

The question is only what happens if it will be permanently unable to repay its debts…

4. Language capacities of the newer Hungarian legal system

4.1. The Fundamental Law of Hungary and the Hungarian language

„Last year the Parliament enacted Hungary's Fundamental Law, which entered into force on 1 January 2012. The National Avowal part of the document which is at the top of the hierarchy of laws states: *„We commit to promoting and safeguarding our heritage, our unique language, Hungarian culture, the languages and cultures of nationalities living in Hungary, along with all man-made and natural assets of the Carpathian Basin", furthermore, Article H) paragraph (2) of the Foundation declares that „Hungary shall protect the Hungarian language"*. „It may be best complied with the undertaking and obligation created for the maintenance and protection of the Hungarian language if it is ensured that the text of written documents created in the legislative processes are always of exceptional linguistic quality. Within the row

301 Hermann, Irén: Önkritikus önkontroll. Bekeményített a NAV. [Self-critical self-control. The NAV (National Tax Authority) in action.] 19/2012, 10 May 2012, http://www.figyelo.hu/hetilap/20120509/onkritikus_onkontroll/

of legislative organs the Parliament, as creator of acts has always had a special role. It activities are greatly important also from linguistic point of view, because any linguistic mistakes (in the structure of sentences, spelling and stylistic mistakes) all appear again in lower level legal sources, e.g. in the text of a governmental decree enacted for the execution of the act, as their linguistic tools are practically the same" – it is stated in a preparation document.[302]

4.2. Regulation of the linguistic compliance of laws

The regulation of this issue is twofold: on the one hand – with regard to the fact that majority of acts are prepared here and decrees are all enacted here – it is necessary to influence the law drafting and law making activities of public administration from linguistic aspects, and, on the other hand, the definition of requirements for legislation within the Parliament is unavoidable, as well.

According to Article 2 paragraph (1) of Act CXXX of 2010 on Legislation the law shall carry a regulation content which shall be clearly understandable for those concerned. This obviously includes the need for complying with linguistic requirements. With regard to this, however, there are no regulations at the level of acts (detailing, clarifying regulations).

Regarding the Parliament the previous Standing Orders of the Parliament of the Republic of Hungary defined as the task of the given committee to examine whether the proposals complied with linguistic requirements, and to state its opinion in the recommendations prepared for the general debate [HSZ Article 95 paragraph (3) section c)]. Since 2004 it has been realised in a way that the linguistic opinion of proposals on the agenda of the Parliament were given to the first appointed committee before the final vote, which submitted proposals for the correction of mistakes. These proposals – theoretically – are not always limited to the correction of spelling mistakes (writing into one or more words, small and capital letters, division of words, punctuation, misspellings, accent mistakes, etc.), but corrections regarding the structure of sentences, wording and stylistic mistakes can be corrected, as well,

302 http://magyarnyelvert.hu/a-magyar-nyelv-es-az-allam/

which in some cases may result in material modification of the text of the norm. In this scope, however, it is unfortunate that the linguistic control of modification proposals is not regulated and established properly.[303] Even though Resolution 36/2012 (IV. 19.) OGY of the Parliament on the modification of the Resolution 46/1994 OGY of the Parliament on the Standing Orders of the Parliament of the Republic of Hungary significantly modified the content of the Standing Orders, no reassuring changes have been made in the mentioned issue.

4.3. Certain features of the present Hungarian language

a) It is a significant fact that the language of the (still) valid laws is often the last form of appearance of the old spoken language – let it be special grammatical structures, certain words, phrases – in the presently used language. In this case it is extremely important to distinguish between the used and the spoken language, because the special language of law has always showed a sort of distance from the spoken version (especially when the language of legal culture was primarily Latin or German…), but today there is a huge gap between grammatical structures used in the everyday language and the grammatical structures used in itemised law instruments made more than 30-40 years ago. Let us examine one example from the Civil Code in force today[304]: according to Article 381 paragraphs (1) and (2): (1) Customers shall be entitled to cancel contracts at any time, but they shall be liable for paying compensation for damages sustained by the supplier. If the situation prevailing before the conclusion of a contract cannot be restored, or if it is justified by the interest of the national economy or by any other appreciable interest, the court, if requested by either party, shall terminate the contract for future considerations in the case of cancellation by the customer.[305]

303 http://magyarnyelvert.hu/a-magyar-nyelv-es-az-allam/
304 1 January 2012
305 Highlighted by me (Á.R.)

Based on the above mentioned facts the danger of the reduction of language capacities may be mentioned; basically the difference of the unchanged reality of artificial legal terminology (its state fixing decades old linguistic status) and the everyday reality of the presently spoken language may be described as the difference between the two blades of a constantly opening scissor. Solutions and possible changing and modification tendencies shall not be limited to Anglicism and to the incorporation of elements of the British/American legal terminology and the overtaken phrases of the special language of the European Union,[306] *on the medium-term the renewal of legal terminology, as well as the general language seems to be necessary.* The UNESCO „Guidelines for Terminology Policies. Formulating and implementing terminology policy in language communities" published in 2005 draws attention to the fact that is the professional terminology of a language does not develop in certain fields or develops, but very slowly, it may happen that in today's quick technological development no material communication may be conducted in the given language in the given fields (thus functional language loss may happen), and this may lead to the exclusion of one-language societies from scientific and economic development.[307] People with Hungarian as mother tongue shall use foreign languages (typically English) during the processing, learning of legal instruments and knowledge accessible (also) on the internet, thus – *it seems that* – they are in disadvantageous language position compared to those who receive this information in their mother tongue.[308]

306 On the same topic see: Láncos, Petra Lea: *Nyelvpolitika és nyelvi sokszínűség az Európai Unióban. [Linguistic policy and linguistic diversity in the European Union.]* Doktori értekezés. [Doctoral essay.] Pázmány Péter Katolikus Egyetem Jog –és Államtudományi Doktori Iskola, Budapest, 2012. /kézirat/

307 Guidelines for Terminology Policies. Formulating and implementing terminology policy in language communities; V-VI., referred to by: Bölcskei, Andrea: A szabványügy és magyar nyelv. [Standards and the Hungarian language.] *Magyar Nyelvőr* 3/2011. p. 28.

308 Bölcskei Andrea: A szabványügy és magyar nyelv. [Standards and the Hungarian language.] *Magyar Nyelvőr* 3/2011. p. 28.

It is important that laws (and individual decisions put into writing) are at the same time important elements of social (collective) memory. The collective memory notion of Maurice Halbwachs refers to the social feature of remembrance; to the fact that recollection is society based interpretation, thus is a reconstructive process. It is a question that at which personal round and at what degree this reconstruction may be made if available linguistic skills (e.g. in understanding the text of laws) are limited.

Despite the above mentioned tendencies attempts to create new legal terminology may be observed in Hungarian legal terminology (and science): e.g. the previous act on legislation (Act XI of 1987 on Legislation) regulated as part of the hierarchy of norms – in addition to laws – other legal means of government control; however, the new act on legislation – breaking up with the paternalist „attitude" introduced in the state socialism – introduced the phrase administrative means of public law nature.

b) A special border-land of written language and spoken language is the so-called SMS-language. Its specific features are also present in laws, so far as different abbreviations, moreover, „structure-shifts" which are considered to be serious linguistic mistakes are present in the newer legal instruments in high numbers. *The mistaken structures of the spoken language may be traced back to the simultaneousity of speaking and receiving: the sending and receipt of the message has a common context.*[309] Speaking is dynamic and depends on the context, its inherent feature is temporal continuity. Specialities determining the linguistic nature of the spoken form originate from the fact that at the time of speaking the emergence of thoughts and the structuring of the text happen at (almost) the same time. The dominance of writing in the legal language is traditionally supported by the fact that that writing, contrary to speaking, spans territorial and temporal differences, it is permanent and may be recalled. In writing the transfer of information is one-sided, no immediate response is given. Due to the different mechanisms determining spoken performance and writing, therefore,

309 Andó, Éva: E-nyelv, netbeszéd. [E-language, net-speaking.] In: *E-világ. XXI. Század - Tudományos Közlemények* April 2010 (23.), p. 33.

the spoken form and the written language differ from each other in several aspects: thus from the aspect of directness and context, lexical consistence and grammatical complexity. There are (should be) consistent differences regarding a) structural complexity (length of sentences, embeddedness), b) linguistic precision, c) frequency of word classes (e.g. the complexity of verbs, abstract nouns, frequency of adjectives), and d) personal relevance, personalisation.[310]

Let us examine a specific example for the expansion of SMS-language in our legal system (which is practically a simple grammatical mistake): based on the modification of the Constitution in 2010 Article 61 paragraph (3) was phrased in the following was: „In the Republic of Hungary, public service broadcasting contributes to foster and enrich national self-identity and European identity, *Hungarian, as well as ethnic minorities' languages* and culture, to strengthen national cohesion and to satisfy the needs of national, ethnic, family and religious communities." The great mistake may go unobserved in spoken language, but in the written text it cannot be accepted; the highlighted text should have been written in the following way: (…) *Hungarian language, as well as ethnic minorities' languages* (…), as „Hungarian languages" do not exist.

c) It may be hardly divided from those written in section a) that laws and other legal texts in a strong supply sector from information point of view could be extremely important tools of establishing social narratives. Collective memory which may be examined within the framework of certain social units – as it has been mentioned before – are tied to time and environment. In the life of smaller groups – thus in families – there are common stories: "each family has its own typical spiritual life; memories for which only they care, and secrets which only family members know."[311] This statement, however, may not only be justified at family level, but also at the level of the society. „Stories play crucial, pervasive role in our lives,

310 Ibid.

311 Andó Éva: A történetmondás kulturális szerepéről. [About the cultural role of story-telling.] In: *Vállalkozás, személyiség, kultúra. XXI. Század - Tudományos Közlemények* September 2010 (24.), p. 55.

> they give form and shape to our experiences. Experiences without stories would be only amorphous, not differentiated flows of events. Story telling and story – synonyms of our knowledge of the world, our daily events get meaning through them and we formulate our expectation from the future though our stories put into words."[312] Who would deny that in a centrally organised society shared and definitely interpretable stories may be reconstructed from written norms at a larger level than necessary…, and in this sense the renewal of the Hungarian legal system carries the need for a special change of narrative.

4.4. Practical language problems in the past years

The extraordinary schedule of legislation has left deep signs also on the linguistic (grammar) quality of prepared drafts and approved laws, many times significantly influencing their content and interpretability: e.g. due to a comma mistake in 2011 some tax laws (would have) entered into force earlier, and a draft law (about churches) was submitted to the Parliament without title (!) at the end of 2011, while in another case familiarity with Roman numbers caused problems, therefore the one hundred and ninety tenth (!) act was enacted instead of the two hundredth.[313]

It shall be added to the complexity of the picture that the education of the details of lawmaking was rather poor in the legal-public administration basic courses, as well as in the materials of different postgraduate specialist courses till the second half of the previous decade, when finally organised codifier courses commenced in Hungary.

Beyond the lack of knowledge of legal technique general reasons (may) also influence the linguistic quality of legislation, such as the change in the level and content of general education. Today, when the accessibility of storable information is getting better, the significance of traditional – lexical – knowledge is – seemingly – getting lower, and focus shifts more and more to how we can find the information and what we can do with it. The problem is that this reorganisation is – partly – secondary, as the

312 Ibid.

313 Tax laws rewritten in every four days. *Index* 18 January 2012 www.index.hu

proper analysis, interpretation and organisation of the knowledge of new fields also require a basic context consisting of changing knowledge elements, but building on similar skills and knowledge.

5. International effects

5.1. Change of stages

The joint effect of changes affecting the legal system and the full system of laws that after forums for internal legislation and the correction of laws get narrower and become partly formal, *discussions to be held step one level above: their focus partly shifts from internal forums to European level.*

A good example for this is Act CCIV of 2011 on the Right to Freedom of Conscience and Religion, and on the Legal Status of Churches, Religious Denominations and Religious Communities (and Act C of 2011 with similar title and content, annulled by the Constitutional Court later), which issued the awarding of church status to the discretional power of the Parliament without defining (prescribing) the conditions of discretion and without providing right to remedy. *In lack of internal forums of remedy the adequate forum of the EU and the European Court of Human Rights in Strasbourg shall deal with the laws and with the individual cases.*

As a matter of fact in August 2012 the parliamentary commissioner of fundamental rights turned to the Constitutional Court; in his opinion legal provisions regulating the recognition of churches violate the principle of the division of powers, the right to fair proceedings and to the right to remedy from several aspects.

5.2. Legislation, as testing

What does the fact draw attention to, that the processes and products of Hungarian legislation resulted in sharper and more intensive reactions than ever before all around the world? Basically to the central role of communication. To the fact that communication cannot be fragmented, and that great mistake of politics may be not only to underestimate the strength of its opponents (e.g. the abilities of international financial

conglomerates subjected to crisis taxes to enforce their interests), but also overestimates the loyalty of its allies.

Naturally, „unorthodox" legal and non-legal solutions forced by the crisis, the desire to handle conflicts in own and new ways is somewhat similar to the child's pushing the limits, to the partially instinctive intention to experience how far it can get in the given situations. From the aspects of our topic it may be important that it may be possible to search for the limits, to map the real motivation and possibilities of those concerned. Therefore today it is not necessarily the primary and definite goal of legislation to create an operable and applicable rule; often one – not main – function of legislation is (may be) the testing of the opinions of typically international actors (EU, IMF, etc.). This function has existed before, but it was not present constantly, due to the lower intensity of global cooperation and effects.

5.3. External criticism regarding Hungarian legislation[314]

On 17 January 2012 the European Commission started infringement procedure against Hungary in three issues, namely the independence of the Magyar Nemzeti Bank (the Central Bank of Hungary), the independence of the data protection authority and the age limit of judicial activities (the service relations of judges is regulated by the Transitional Provisions to Hungary's Fundamental Law and the transitional provision of act on the status of judges in a way that the age limit is reduced from 70 to 62). (Also) in the latter case some processes received some impulse from the fact that the Constitutional Court decided about the issue on the merits.[315]

314 Regarding certain criticisms in details see e.g. Prugberger, Tamás: Az Európai Unió és az IMF reflexiója az Orbán-kormány politikai törekvéseire (…). [Reflections of the EU and the IMF on the political ambitions of the Orbán-government (…)] *Polgári Szemle* 1-2/2012. pp. 15-34.

315 The Constitutional Court held that Article 90 section ha) and Article 230 of the Act CLXII of 2012 on the status and remuneration of judges are against the Fundamental Law, therefore annulled them with retroactive force from the day when the act entered into force – 1 January 2012. According to the reasoning of Decision IV/2096/2012 AB „no specific age limit may be derived from the

Regarding the possible impeachment we shall state that according to Article 4 paragraph (3) of the TEU a fundamental obligation of the authorities of member states – thus of the legislative organs of the EU member states – is to ensure the effective enforcement of EU law.[316] One form of behaviours of member states and their authorities in violation of EU law is when the legislative organ of a member state enacts a law in the member state which violates the EU law. It is the task of the Commission to make members states to enforce EU law, and for the performance of this task the EU law provides tools for it against member states, for example the initiation of infringement procedure against a member state. According to Article 258 TFEU (ex Article 226 TEC): „If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union".

The constitutional law advisory body of the Strasbourg-based European Council (EC), the Venice Commission published it opinion about Hungarian acts regarding the judiciary in March 2012. According to the Venice Commission significant elements of the Hungarian judicial reform, in case they remain unchanged, will be not only against European norms regulating the structure of judiciary – especially the independence of judges – but may also be considered problematic from the aspect of the enforcement of the right to fair procedure.

The Venice Commission criticised the Hungarian act on churches from several aspects, according to the Commission it is doubtful whether

Fundamental Law. It may be held, however, that the introduction of the age limit, if it concerns the reduction of the upper limit and not the increase of the previous age limit, shall happen gradually, during proper transitional period, wihtouth the violation of the right of the judge to unremovability." With regard to the afterlife of this decision it shall be mentioned that the Zalaegerszeg Labour Court already reset a judge in Kaposvár to her position as a judge in August 2012.

316 Blutman, László: *Az Európai Unió joga a gyakorlatban. [EU Law in Practice.]* HVG-ORAC, Budapest, 2010. 425.

a community is recognised as church or not, it belongs to the exclusive decision making authority of the Parliament.

Behind each mentioned case there is – among others – the fact that there was no proper – substantial – or was no consultation at all with those concerned in the given regulatory field. Due to the EU and international criticism the Hungarian party adjusted several problematic provisions, but regarding the future it is still unclear how and along what institutional guarantees (or changing practices) the preparation of law will be improved, e.g. via discussion with the concerned field.

The Commission, by the way, issued a statement already in June 2011 about the Fundamental Law, which was not yet in force at that time. Majority of the criticism formulated in the statement – beyond some material objections – concerned the procedure of legislation. At that time the Venice Commission regretted the fact that the procedure of constitution making lacked transparency, there were deficiencies in the discussion between the governing parties and the opposition, there were no proper guarantees of necessary social discussion, and the time limit for the complete procedure was extremely short. The body also resented that several fields are not regulated in detail in the constitution, and refers those issues to 2/3 majority, cardinal acts which in most legal system belong to the sphere of everyday political legislation and require simple majority decision. Furthermore, the Venice Commission indicated that it found the limitation of the competences of the Constitutional Court in „tax and financial issues" problematic.

The IMF was ready to start negotiations 2012 about the so-called stand-by loan only upon the condition that the Hungarian government enforced the required steps and made the necessary legislation for ensuring the independence of the Magyar Nemzeti Bank.

VII. The existence and role of lawyers' elite as a key issue of governmental capacity

A further important question of governmental capacity – resulting from the transformation of the whole legal system – is the transformation and role changes of the above described lawyers' and administrators' layer.

Rózsa Hoffmann, undersecretary of state in the field of education in the Ministry of Human Resources (earlier Ministry of National Resources) stated the following in February 2012 as a reaction to a special one minute speech in the Parliament: „The education policy of the FIDESZ-KDNP wishes to serve the improvement of the country, which, as it is well-known, „cannot be achieved with lawyers, communication specialists or sociologists", but with those studying engineering, IT sciences and natural sciences. This is the reason why the government concentrated 70% of the centrally financed places to these latter fields, even though – theoretically – there may be students studying at social sciences course who cannot ensure the financing of their fees in advance, as within the so-called *Student loan 2* program it is possible to complete legal or economic studies with minimal own sources. The program which started in September 2012 allows self-funded students to receive loan at low interest rate (2%), which they will have to pay back after they completed their studies. Another funding form will be that the state returns the amount of the student loan to those students who complete their studies in legal or economic field through self-funding and start working for the state afterwards. [317]

Contrary to the statement of the undersecretary of state we shall not that the all time „good state" needs the self-conscious and united legal elite, which as „engineers of society", the representatives of a special normativity performs in a target setting, first motivating role: Hungarian history itself is the best evidence that legal profession and the existence

317 The threat of pushing out/exclusion of the „poor" from the legal career is weakened and balanced by the fact that according to national surveys law students – regarding their social recrutation – usually come from quite high status families.

of the legal society is not some „necessary bad thing", as in the revolution and freedom fight of 1848, in 1945 and in the short period following it, or in the social changes of 1989 – though not always at the same degree, but – significant (regarding key movements sometimes overwhelming) role was played by legal professionals.

The brief description of the above mentioned polemy presents the contours of another important question: why have not been comprehensive – i.e. examining several aspects at the same time – researches made in Hungary since the 1970s, which could have examined with scientific means the structure of the society of legal professionals, the existence of a legal elite, its system of values, the effect of this layer (?) made on decision-making, etc.?

Even though elite researches have been present in Hungarian social sciences for long[318] no substantive surveys have been conducted regarding the how and how much the legal professionals and the legal elite influence decision affecting society as a whole. The last time when a – more or less – comprehensive survey was made about legal professionals in Hungary[319] but this was also a politically strongly motivated and filtered process, as e.g. the sample of „lawyers' examination" was created by the researchers based on the position taken in the social division of work, therefore „lawyers working in the field of law" were included into the research sample. With this methodology approximately 53% of those having law degree were excluded from the research…[320] This sample selection did not facilitate the analysis of the real social situation of lawyers, and the analysis of lawyers as a professional group left e.g. the internal hierarchical structure, the possibly existing elite group within legal

318 Lásd pl. az MTA Politikatudományi Intézetében lezajlott kulturális elitkutatást. Ennek ismertetését lásd See for example the cultural elite research conducted in the Political Sciences Institute of the MTA. For its details see Kristóf, Luca: Politikai nézetek és reputáció az értelmiségi elitben. [Political views and reputation in the intellectual elite.] *Politikatudományi Szemle* 2/2011. p 83.

319 Angelusz – Balogh – Körmendy – Léderer – Székhelyi: A jogászság társadalmi helyzete és szakmai életútja. [Social status and professional career of legal professionals.] Szociológiai Füzetek 13. Oktatási Minisztérium, Budapest, 1977.

320 Gyekiczky, Tamás: *A jogászok joga. [Law of lawyers.]* Gondolat Kiadó, Budapest, 2003. p. 16.

professionals, and the possible reasons and outlines of the organisation of this elite in the shade.[321]

For the sake of completeness and fairness we shall state, of course, that several studies have been prepared in this field or regarding this field in the past decades, but a common characteristic of these is that they deeply study questions regarding legal professionals but only from one aspects, and they work with rather small samples (let the inquired people be lawyers, law students, or „simple citizens" who share their opinion about legal professionals.) Some researches from the past decades concerning legal professionals were related to legal professional sectors and to the legal elite (e.g. Ágnes Utasi, Béla Szabó, Tamás Gyekiczky, Attila Badó, Zoltán Fleck), some dealt with the recruiting of certain legal professions (e.g. Róbert Angéluz and his colleagues, László Kelemen, Mihály Fónai), or examined the motivation and career ideas of law students (e.g. Imre Kabai), or presented the changes of the numbers of the practitioners of certain legal professions (e.g. Miklós Szabó). Naturally, almost each author – in longer or shorter chapters – dealt with the sociological notion of legal professionals (as preliminary issue), as well as about the social judgement of law and legal professionals.[322] Mihály Fónai gives a good summary of – the most important – works made so far.[323]

In centrally organised societies changes usually do not get into the , spaces, spheres of the public in their full scope, in their real values, but usually in a simplified way, in symbolic ways, and the tematization of public conversation may also be performed only through simplification. In social changes symbolic legal itemizations have always had their role[324] however, earlier – mainly before the change in the legal system – these were mainly tool-like, law was the „maid" of a specific ideology. On the

321 Ibid.

322 On the latter on see e.g.: Kelemen, László: *Miként vélekedünk a jogról? [What do we think about law?]* Line Design Kiadó, Budapest, 2010. p. 215.

323 Fónai, Mihály: A jogi és igazgatási képzési területen végzettek elhelyezkedésének presztízs szempontjai. [Prestige aspects of job finding of those with law or public administration degree.] In: *Diplomás pályakövetés IV. – Képzésterületi tanulmányok.* 227. http://www.felvi.hu/pub_bin/dload/DPR/dprfuzet4/Pages227_244_Fonai.pdf

324 Varga p. 65

contrary, after the change in the political system the law seemed to be turning into the carrier of specific, separate explanations of reality.[325] Among the reasons for the latter one we shall mention the fact that with the change in the political system the role of legal rationality and legality significantly increased, the establishment of capitalist market and the rule of law had direct effect on legal professions, as the society directing function of the law could unfold fully under the conditions of the rule of law, it can be enforced under these conditions, therewith capitalist economy needed much more intensive – moreover, continuously inventive and proactive – legal assistance.[326] A peculiarity of the (Hungarian) change in the political system was that a legally controlled democratisation happened, which strengthened the development of legal reasoning, and the expansion of legal professionals in the procedure of the negotiation type change in the political system.[327]

The fact that in the past 35 years no comprehensive surveys – examining the group of legal professionals as a whole, its system of values, internal system, network of relationships, etc. – which would have been aiming at full scope examination were made is quite surprising, especially because such survey would easily answer social questions – well beyond lawyers, related to the establishment of law and its enforcement – such as:

- is the group of legal professionals a separate elite group in today's Hungarian society? Moreover, whether it is true that we may talk about lawyers still just as a functional elite, which – contrary to the political and economic elite – is not present in society as so-called system integrative elite segment, but only as socio-integrative element.[328] It is obviously not worth making the mistake of researching and presenting – in this case the legal professionals and the legal elite – as completely separate group, because „the legal elite may be found in almost all big systems, integrations of society, just like the sphere of

325 Gyekiczky op. sic. 23.

326 Fleck Zoltán: Változások és változatlanságok: a magyar jogrendszer a rendszerváltás után. [Changes and non-changes: Hungarian legal system after the change in the political system.] Budapest, Napvilág Kiadó, 2010. pp. 68-69.

327 Fleck op. sic. p 67.

328 Gyekiczky op. sic. p. 31.

its activities, the network of legal system".[329] For the separation of connection points the fact may serve as a reason according to which as social basis of foundations of law these factors may be indicated in a centrally organised society such as economy, moral (cultural) order, power structure, law making and law enforcing institutions, etc. On its own none of them may be able to determine the existence and content of law, but their dominance in certain constellations may be determinative also regarding the segment-like characteristic of legal elite. Functional description, however, is also problematic because the legal elite in itself operates institutions, groups intended to produce ideology and knowledge, and it seems to be obvious that it performs its tasks with the use of its knowledge elite network, which consist not only of lawyers.[330] Researches – moreover, the formulation of questions – is made difficult by the fragmentised society, the exact location and features of the breaking lines of which is not mapped well. „Fragmentisation may be also observed in the fact that there is no access between „partial societies", and that they barely know anything about each other, or phrasing it more precisely, their ideas, beliefs about each other are mainly based on half truths, prejudices, intolerance and often on searching for someone to take the guilt."[331] Such question raise new ones, e.g. regarding the possibility of forming a Roma legal elite in Hungary.[332]

- What are the conditions which influence internal relationships: the university of the diploma, common profession, belonging to the specific legal profession, age or something else? Each of them and if yes, at what degree (ratio)? What are the dominant group making factors, and along with what kind of breaking lines does this group get segmented and establish its own elite? Is the group of legal professionals a network group, which is organised through the

329 Gyekiczky op. sic. p. 27.

330 Gyekiczky op. sic. p. 31.

331 Gazsó, Ferenc – Laki, László: *Fiatalok az újkapitalizmusban. [Young generation in the new capitalism.]* Napvilág Kiadó, Budapest, 2004. p. 43.

332 On this issue see also: Rixer, Ádám: Egy új társadalmi szerződés körvonalai a roma kérdés ürügyén. [The outlines of a new social contract under cover of the Roma issue.] *De Iurisprudentia et Iure Publico* 3/2009. p. 11. (www.dieip.hu)

creating and operating of its own network.[333] These questions may be answered also with the methodology of the quickly developing *network research*.

In relation with the education (legal education) it may be clearly defined that the state is shifting balances; it creates new preferences both on the input (significant reduction of state funded university education spots) and regarding future employment, and by the preparation of legal (elite) universities and the establishment of an elite university in the field of public administration[334] it might start the – possible – rivalry between these two (at the same time preparing to replace the traditional legal career lines, traditions public administration legal elite with an administration elite[335]).

- Is the hypothesis appearing other in social sciences and in the media – though never justified well – according to which the ability of the „jurist lobby", the „lawyers' lobby" to enforce interests is stronger than that of any other group? Whether this is in connection with the scientific assumption that the establishment of the legal profession as separate field of activities necessarily brings about the fact that the making and application of law (at least the technical aspects of making) will become the exclusive competence of this separate group of legal professionals. [336]
- Is it true that the quality of relationships within the society of legal professionals, the – professional and human – cohesion decreased within the group? What can be the reason behind the fact that e.g.

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333 Gyekiczky op. sic. p. 29.

334 According to the Preamble of Act CXXXII of 2011 on the National University of Public Service and on the higher education of public administration, law enforcement and military: „As part of the Hungarian higher education the objective of the National University of Public Service with administrative, law enforcement and military courses is to train professionals carrying out administrative, defense and law enforcement activities, to provide the officer supply of the defense and law enforcement organs, and to create the interoperability of the unifying public service careers."

335 On this topic see further: Rixer, Ádám: Jogászok a közigazgatásban. [Lawyers in public administration.] *De iurisprudentia et iure publico* 3/2007. pp. 112-125.

336 Kulcsár (1997) p. 20.

in the survey of the Hungarian Lawyers' Chamber conducted at the beginning of 2009 about custodian services – as a significant problem of lawyers' practice at that time – only very low ratio, 1.5% of the members of the Chamber participated?[337]

- It is an exciting question that in families where there is a lawyer among the ancestors, in what way and with that content the special system of values are transferred to the next generation(s) (thus what the characteristics of generational reproduction are in „lawyers' families"), and that at what degree the adequate social preparations (socialisation) are directed at the descendents who shall become lawyers themselves.
- What is the culture creating role of this group regarding its own members and the members of societies, beyond the transmission of strictly legal culture?[338] With the latter issue we arrive to the classic questions: 1) to the issue of legal professional and/or lawyer intellectual and – upon Csaba Varga – to the question 2) whether there is a specific legal view of the world.
- How much can legal professionals be taken as a group of reference in today's Hungarian society?[339]
- At what degree did it monopolise decision making possibilities? What is the degree of the decision making competences of this group, with regard to the scope and tools of decisions concerning the whole society?[340] What is it responsibility in the practice that today for the solution of social conflicts we all demand the modification of laws, because we only focus on the text of the norm, while 1) we do no tor just partially apply the existing legal tools; and 2) the debate in reality – traditionally – is about the content of the rules, of their

337 Patyi Gergely: *Ügyvédség a köz- és magánjog határán. [Lawyer at the edge of public and private law.]* Doktori értekezés. PPKE JÁK Doktori Iskola, Budapest, 2011. p. 205.

338 On this topic see e.g.: Máthé, Gábor: Előszó. [Preface.] In: Máthé, Gábor (editor): *A Magyar Jogászgyűlés (1870) és a Magyar Jogász Egylet (1879) alapítása. [Founding of the Hunagrian Lawyers' Meeting (1870) and the Hungarian Lawyers' Association (1879).]* Kódexpress Kiadó, Budapest, 2010. p. 3.

339 Gyekiczky op. sic. p. 28.

340 Gyekiczky op. sic. p. 29.

textual appearance, and not about the background principles. [341]

- Is it possible to reconstruct the background of the way of thinking, the ethos, approaches and communication of the legal professionals and the legal elite from texts made before 1989 (or even earlier, before the Second World War)?
- At what level did the party elite and the legal professionals, the legal elite interlock in the state socialism and after the change of the political system? In addition to mapping political interests and actives it could be extremely interesting to measure the degree of religiousness among the older and younger lawyers' generation.
- Within the governance models[342] – getting more and more popular with the EU – which aim at describing the transforming functions of the state and the new solutions of the operation of the state organisation, an exciting research topic could be the mapping of whether new – partly EU – institutions, new ideas and methods of task performance at the same time change the features of legal professionalism, the degree of the need for lawyers. [343]
- What is the degree of *continuity* in the selection mechanisms of different state legal professions compared to the previous, basically counter selective, nepotic practices and organisational culture? For example the based on the comparison of the analysis of newer laws about civil servants[344] and older regulations about civil servants with the ideal type of the closed human resources system it may be considered clear „[that] the Hungarian system cannot be considered a closed system. After thorough examination it becomes clear that certain sub-systems and legal institutions traditionally ensure extremely

341 Fleck, Zoltán: *Változások és változatlanságok: a magyar jogrendszer a rendszerváltás után. [Changes and non-changes: the hunagrian legal system after the change in the political system.]* Budapest, Napvilág Kiadó, 2010. p. 75.

342 See e.g.: Maartje De Visser: *Network-Based Governance in EC Law*. Hart Publishing, Portland, 2009. pp. 3-5.

343 Regarding EU relations see e.g.: Marján, Attila: Az Európai Unió intézményeinek közigazgatási rendszeréről és humánpolitikájáról. [About the administrative system and human policy of the institutions of the EU.] *Jog, Állam, Politika* 4/2009. pp. 183-188.

344 Act CXCIX of 2011 on civil servants

broad discretion for the decision maker, do not oppose subjectivity and absolutism. Therefore they are not suitable to prevent the use of direct political aspects, as they are not able to prevent the emergence of nepotism, clientelism and patronage."[345]

345 Dr. Gajduschek, György: *A köztisztviselői jogviszony hazai szabályozásának szisztematikus, átfogó elemzése. [Systematic, comprehensive analysis of the Hunagrian regulation of civil servant relationship.]* Pécsi Tudományegyetem Állam- és Jogtudományi Kar Doktori Iskola, Pécs, 2011. p. 149.

VIII. Summary

In case of a work presenting several examples and using the methods of several scientific fields for their – partly systematic – analysis summary, the statement of revealed relationships in a separate listing is extremely important. We shall stress again that in majority of the given aspects this book arrives only to the formulation of questions and the presentation of examples necessary for answering the questions, trusting the Reader and the leaders of further researches with the task of arriving to consequences.

The questions – which are related to the legislation of the past two decades – are partly material ones, searching for the concrete solutions of given regulations; and partly they examine the features of legislation, i.e. they concern its compliance with aspects set forth in the established law and beyond the law.

An important fact shall be clarified in advance, namely that part of the tendencies outlined in this paper – e.g. the reorganisation of the performance of public tasks, the termination of an excrescent state-civil organisation („GUANGO"), answers given to financial crises – do not only contain new, post-2010 elements, but we can mention them as important, well describable processes from most aspects only from this date.

If we examine the valid Hungarian laws along the aspects offered by this paper we may observe a double tendency: on the one hand we witness the extension of state role taking, on the other hand the intentions of the more active – upon its own self-determination – state is quasi supplements, counterbalances, or partly supports the other tendency, which is presented by the more precise and more exact definition, also regarding its consequences, of individual and society level responsibilities and obligations. Newer legislation obviously aims not only at separated handling of individual phenomena, but as it may be seen from the catalogue prepared in subchapter 4.3.2.3 the legislator started frontal attack at each fields which the representatives of different social sciences and public opinion itself considered to be social level weakness, thus against the

mass phenomenon of „living from the state", against attitudes pricing different punishments as calculable low price of the violation of law, or the system maintaining institution of gratitude payment. As a framework of different – for the first sight individual – *rules of responsibility* the new concept of *public interest* emerges in front of us; public interest which – according to the intentions of the legislator – will be defined less and less as the uncertain sum of individual aspects.

The self-referential, autopoiethical closeness of law – in the broadest sense – may be further observed, which makes the use of arguments beyond law rather difficult in reasoning. At the same time, however, an opposite tendency may also be observed in the pages of this book: economic and – partially related to it – moral force, certain natural law reasons, religious contents sometimes quasi „replace" or „weaken" traditional – settled during the liberal transformation – legal arguments, sets of reasons and sometimes – in a restricted way – also itemized provisions.

Majority of legally itemized newer requirements point into the same direction: it aims at establishing a social norm system based on new grounds. The observation, namely that *law cannot be the permanently strongest norm system of a state or society which is able to handle crises on the long run* is mirrored in new principles and specific legal institutions. It has become clear that law was unsuccessful in simulating, replacing the moral material of society with its own tools; law – in itself, without other supporting norm types – cannot create an autonomous moral reality, the structure of simply becomes overloaded and inoperable (see examples mentioned in subchapter VI.3.3). Rephrasing it: the traditional course of the rationalization and positivization of law – described by Max Weber – seems to be showing the signs of sudden stop – not only in Hungary, in the Hungarian legal system, of course.

In the establishment of the new context of law the legal system itself has a great role: it attempts to strengthen its own foundations by opening up itself to the traditional – more theoretical – values and specific legal constructions of the past (e.g. incorporating historical constitution into itemized law). Nevertheless, regarding natural law tendencies we shall stress that majority of changes which occurred in the legal system is

only „relative natural law" oriented, thus they are answers to certain specific extraordinary situations. Even if due to certain forces, but in Hungarian law the background principles of law keep coming to the front; a law is being „conceptualised" which, instead and in addition to material answers also focuses on the practice that the answer given in legal nature (legal answer) shall be preceded by a more precise definition than ever of the moral ground of the given situation. Practically a law is being outlined which opens up more than ever the scope of aspects which may be and shall be considered during legal evaluation (either through new principles or – as it has been mentioned – by incorporating the aspects of the past and future, as possible arguments).

A significant and new element of the transformation of the legal system is its concept of legal continuity. The moral reasons and political motivations of this concept are clear, but its undefined notions (e.g. historical constitution) and its specific, or rather complex relationship with certain historical periods (1990-2011) partly reproduces them instead of clarifying certain questions.

The emphasized subjects of legal instruments made after 2010 are the large care systems and the related legal relationships. Within this topic it is a striking duality that behind the transformation of certain large systems exclusively short-term fiscal interest may be observed (e.g. secularization of private pension fund property), while in the case of other systems (health care, education) real conceptual, systematic transformations were realised via legal changes. The evolvement of the new legal system was not only supported by the establishment of the Fundamental Law, but also the approval (preparation) of new codes in almost all significant fields of social being (e.g. the Penal Code, the Civil Code and the Labour Code shall be mentioned above all).

It is undoubted, as well that the most comprehensive Gypsy strategy of the past decades has been established in a was that not a unilateral governmental act, but a bilateral agreement laid down the foundations of further legal regulations.

This work has provided several reasons – originating in the basic social-economic structure and in the historical past – of this significant legal transformation, which may be compared to the changes of 1989.

The transformation which – clearly – defined as its goal the liquidation of the false social public agreements existing for decades, sometimes for centuries, with the available tools of law. It is a twofold fact – which deserves further scientific research – that while majority (!) of the material rules of the transformed law has been supported with strictly value-related and newly defined authorizations and principles, during the legislative procedures which were conducted between 2010 and 2012 several guarantees were continuously, systematically and consciously neglected. Within the evaluation of this controversy – as it has been mentioned in the Introduction – the most important element is what significance we give to forces originating from different crises (external-internal, moral-financial, etc.). Both in political argumentations and within professional reasons the sharpest idea is the question whether the strong legal voluntarism of the power structure which does not necessarily comply with the rules of legislation may be – theoretically and in practice – suitable to carry out the radical – or maybe revolutionary – renewal of society. The significance of the latter question is increased by the fact that the operations of the legislative mechanisms not always paying attention to the existence of rules, moral messages and specific provisions regarding accelerated legislation were meant to be justified by this latter fact, i.e. the need to put an end to the moral deepening of society.

Within the framework of legislative procedures we may state that the traditional weaknesses of Hungarian public politics (e.g. politicised and instable practice of interest negotiation) „reproduced" also in the examined period. The work also raises the question whether there is an objective limit to the speed of legislative procedures and to the number of legislative products. Thus on the one hand whether the ability of the society to reception and the performance of the legislative – complying with basic professional requirements – have any measurable limits; rephrasing it: whether there is a possibility to create such intensive legislation which is necessarily counter-productive, which generates more significant disadvantages than advantages for society, and if yes, the use of which indicators would be advisable during the examination of the phenomenon.

This work also draws attention to the fact that within the examination of the transformation of the legal system it is not really possible to disregard the evaluation of a broader scope of the legal system, the existence of *comprehensive* research projects – carrying the need for fullness – regarding legal profession and the system of related values. This work wished to contribute to the anticipated future researches with the composition of a catalogue of questions, which at the same time sketches the outlines of recommended research approaches.